EMPLOYMENT TRIBUNALS

Claimant: Mr P Arthur

Respondent: The Protector Group Ltd

Heard at: **Remotely by Cloud Video Platform ('CVP')**

On: **31st August, 1st, 2nd September and 4th October 2021**

Before: **Employment Judge Sweeney**
Lynn Jackson
Stephen Carter

Representation: For the Claimant: Andrew Webster, counsel
For the Respondent: William Haines, consultant

JUDGMENT having been given to the parties on 4th October 2021 and a written record of the Judgment having been sent on 20th October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Procedural background

1. By a Claim Form presented on **14 October 2020**, the Claimant brought complaints of direct race discrimination, unfair dismissal, detriment under sections 48 and 43B Employment Rights Act 1996 ('ERA'), wrongful dismissal and unauthorised deduction of wages/breach of contract. The complaint of race discrimination was dismissed upon withdrawal on **27 March 2021**.

The Final Hearing

2. The Tribunal convened at 10am on **31st August 2021** to discuss the complaints, the issues and a timetable for the hearing. The Tribunal noted that the bundle of documents contained transcripts of recorded conversations. However, the representatives confirmed that they were not inviting us to listen to any recording. At 10.40am the Tribunal then adjourned to complete its reading of the statements

and relevant documents and reconvened at 11.55am to hear the evidence, beginning with the Respondent's witnesses. Evidence and submissions were completed by 3pm on **02 September 2021**. The Tribunal used the remainder of that day for deliberations and adjourned to **04 October 2021** for further deliberations and for judgment to be given orally in the afternoon. Early in the morning of **04 October**, the Tribunal invited the representatives to make further written submissions on a decision of the EAT, **Kong v Gulf International** [2021] 9WLUK 125. They did so that morning and the Tribunal was able to take account of those submissions in its deliberations.

List of issues

3. A list of issues had been prepared and sent to the Tribunal by the Claimant's representatives shortly in advance of the hearing. Although it was headed as a 'draft list', Mr Haines confirmed at the beginning of the hearing that it 'appeared to be agreeable'. He also conceded that the Claimant had made a protected disclosure in his email of **05 May 2020**, found at page [**93**] of the bundle. The Tribunal said that it wanted to know by the time the evidence started if the list was agreed and if not where there was disagreement. On resumption of the hearing, Mr Haines confirmed that the list was agreed 'subject to the 6 detriments' identified as (i) to (vi) in paragraph 2 under the heading 'detriment', by which he meant that the Respondent did not accept that the Claimant had been subjected to any such detriments. The list is attached as an **Appendix** to these reasons.

Witness evidence

4. The Respondent called three witnesses as follows:

    1.1.1. Paul Kelly, dismissing manager,
    1.1.2. John Hyde, appeal hearing manager,
    1.1.3. Melanie Todd, Payroll officer

5. The Claimant gave evidence on his own behalf. He also served and intended to call as a witness Mr Peter Short. Just before midday on **01 September 2021**, Mr Haines said that he did not propose to ask Mr Short any questions and that he accepted the content of Mr Short's witness statement. Mr Short was discharged and he disconnected from the hearing.

Documents

6. The parties had prepared a bundle of documents consisting of **403 pages**. Some additional documents had to be added during the course of the hearing. On **01 September 2021** @ 10:55, Mr Haines forwarded to the Tribunal two emails: one dated **27 May 2020** @ 13.21 from 'Control Room' (Nigel) to Mr Stuart Tisseman and Simon Lynch, in which he forwards an email from Mr O'Rourke of the same date @ 13:16; and one from Emma Harrison to Mr Tisseman (cc John Shaw, Peter Short and Suzanne Prendergast) of **27 May 2020** @ 16:58. Mr Haines sought permission to admit those emails in evidence and to recall Mr Kelly (whose

evidence had by then been given). Mr Webster did not object to the emails being admitted in evidence but objected to Mr Kelly's recall. Having considered the matter, we agreed that Mr Haines should be permitted to recall Mr Kelly to deal with the two additional emails.

Costs application

7. The Claimant made a costs application in writing dated **09 March 2021**, which was said not to be dependent on the outcome of the hearing. At the end of the day on **02 September 2021**, the Tribunal gave directions for the parties to send their respective written submissions to each other on **17 and 29 September 2021**. After the Tribunal gave its judgment on liability on **4 October 2021**, the parties made further brief oral submissions on the costs application and the Tribunal went on to determine that application that afternoon. A separate judgment on costs and written reasons have been sent to the parties.

Findings of fact

8. The Claimant commenced employment with the Respondent on **29 August 2008** as a Security Guard. He worked at various sites as instructed by his employer. However, from April 2017, he had been based exclusively at the ABP Wessex food processing site in Northallerton, ABP being a client of the Respondent. The Claimant was dismissed from his employment on **03 June 2020**. That decision was made by Mr Paul Kelly, Sales Director North.

9. As is well known, due to the Coronavirus pandemic, the country went into its first national lockdown on **23 March 2020**. The Government instructed people to stay at home. There were some limited exceptions to this 'stay at home' instruction, one of which being that people were permitted to travel to and from work where this was absolutely necessary and where their work could not be done from home. In addition, those who had symptoms of COVID-19 or who lived with or came into close contact with someone with such symptoms were to stay at home and self-isolate.

10. Given the nature of the Respondent's work, namely, the provision of site security 24 hours a day, self-evidently this could not be done by employees working from home. Therefore, security staff continued to attend work. This movement of people to and from work was believed to present a risk of transmission of COVID-19. Peter Short was a Health & Safety Manager for ABP Wessex at the time. He had put in place health and safety measures in response to the pandemic, with a view to minimising the risk of transmission. These measures were applicable not only to ABP staff but to all those on site, including the Respondent's security staff.

11. On **9 April 2020**, the Claimant suggested to a colleague, Russell Clark, that Mr Clark should leave his place of work and return home to self-isolate. The reason for this was that Mr Clark, while at work, had complained of being short of breath. He mentioned to the Claimant that he had recently had a heart operation. The Claimant provided him with an APB Wessex Coronavirus form which Mr Clark

completed, stating on the form that he had shortness of breath. The Claimant contacted Peter Short, who instructed the Claimant to send Mr Clark home.

12. A couple of weeks later, on the morning of **23 April 2020**, David Everett rang the Claimant cautioning him against sending Mr Clark home from work for any coronavirus related issue, as the Claimant did not have the authority to do so. Mr Everett was an Operations Manager, to whom the Claimant reported.

13. On Friday **1 May 2020**, Mr Clark attended work as usual. On this occasion, he said to the Claimant that he was not supposed to be there because his wife had developed COVID symptoms. He told the Claimant that a Manager had insisted he come in. This conversation took place in the presence of another employee, Adisa Adeniran. The Claimant took Mr Clark's temperature (which was one of the measures introduced by Mr Short) and gave him an ABP Wessex Coronavirus form to complete (a document created by Mr Short). He then contacted Mr Anthony Hughes, the General Manager of ABP Wessex. Mr Hughes instructed the Claimant to send Mr Clark home. The Claimant asked Mr Clark who it was who had told him to attend work. Mr Clark told the Claimant that it was Mr Everett. Also present at this time was another colleague of the Claimant, Mr Robert O'Rourke, who had come into the Gatehouse at the invitation of the Claimant.

14. The Claimant then telephoned Peter Short. He explained to Mr Short that a colleague called Russell (that is, Mr Clark) had just told him that he was at work even though his wife was at home with coronavirus symptoms. He asked Mr Short to speak to Mr Clark directly. Mr Short did so and asked Mr Clark why he had come into work in circumstances where his wife was displaying COVID symptoms. Mr Clark said to Mr Short that 'control' had told him to come in. Mr Short told Mr Clark to leave the site immediately, go home and self-isolate.

15. The reference to 'control' is a reference to the department where Mr Everett worked and where he is an operations manager. Mr Everett reported to Mr Stuart Tisseman, another Operations Manager, who in turn reported to Mr John Shaw, a Senior Operations Manager.

16. On Saturday, **02 May 2020,** Mr Short emailed Mr Shaw copying in Suzanne Prendergast (HR manager) and David Everett [**page 91-92**]. In that email, Mr Short said that he had spoken directly to Mr Clark who had told him that he had been told to come to work. He expressed disappointment and that the incident had potentially exposed staff to greater risk of COVID.

17. The Claimant was on shift with Mr O'Rourke on **02 May 2020**. In conversation, Mr O'Rourke said to the Claimant that Mr Everett did not like him (i.e. the Claimant). Mr O'Rourke told the Claimant that, if he were asked about the incident regarding Mr Clark's attendance at work, he would not tell the truth as he was concerned for his job.

18. The Claimant was concerned by what Mr O'Rourke had said and that Mr Clark, as he believed, had been instructed to attend work on **01 May** despite his wife having symptoms of COVID-19. At **9.08pm on 05 May 2020**, he emailed Ms Prendergast about the events surrounding Mr Clark and Mr Everett, complaining of Mr Everett's actions [**page 93**] (the 'PID'). He copied Mr Everett into the email.

19. Thirty minutes later, Mr Everett emailed Ms Prendergast, copying in John Shaw [**93**]. He dismissed the Claimant's email as "*absolute nonsense"*. He added that the Claimant was "*getting beyond a joke".*

20. Mr Everett went on to say that

> *"'These accusations are becoming increasingly common and unfounded and I believe we need to investigate these fully and unless evidence is found to substantiate his claims, we should take action*."

21. On **06 May 2020** @ **08.29**, Mr Shaw emailed David Everett, Suzanne Prendergast and Stuart Tisseman [**page 102**]. In his email Mr Shaw said:

> "*This employee is getting out of control and is putting out accusations left right and centre. It's always someone else who seems to be the problem, and he cannot work with anyone without causing issues*."

22. The subject line of Mr Shaw's email was the same as in Mr Everett's earlier email on **page 93**: '*FW: ABP Wessex – Mr. David Everett's Actions'*. Therefore, the Claimant's email of **05 May 2020,** which he sent to Ms Prendergast and Mr Everett only, had now been forwarded to Mr Shaw by Mr Everett, and to Mr Tisseman by Mr Shaw.

23. Later that day, on **06 May 2020** @ **12.04pm**, Mr Tisseman emailed Ms Prendergast, Mr Shaw and Mr Everett to say that he had spoken to Mr Clark regarding the events of Friday **01 May 2020** [**page 101-102**]. Mr Tisseman said that Mr Clark's version of events was in direct contradiction to the Claimant's. In his email Mr Tisseman said that Mr Clark had told him that he not spoken to Mr Everett prior to arriving at work and that he only learned of his wife's symptoms when she called him 5 minutes prior to his arrival at work. Mr Tisseman said that Mr Clark had not been sent to work by anyone and that he did not tell anyone on site that he had been instructed to attend. This was in contrast to what Mr Short had said in his email to Mr Shaw, Ms Prendergast and Mr Everett, which was that Mr Clark had told Mr Short that he had been 'told to come here' [**page 92**]

24. Mr Shaw sent a further email to Ms Prendergast, Mr Tisseman and Mr Everett on **06 May 2020** @ **14.52** [**page 10**4] to which he attached an earlier email from the Claimant (which the Claimant had sent on **23 April 2020**). Mr Shaw said in his email that "*he [the Claimant] was basically telling control to remove officer from shifts*".

25. Therefore, in less than 24 hours, the managers in 'control' had expressed their utter rejection of the Claimant's account and described the Claimant as being out of control. Mr Shaw and Mr Tisseman had taken it upon themselves to speak to the witness to the complaint (Mr Clark) and to email the subject of it (Mr Everett) dismissing the complaint as nonsense. They had emailed their thoughts and conclusions to Ms Prendergast.

26. Mr Simon Lynch was employed as Head of Support Services and was on a similar level to Mr Shaw, both of whom reported to the CEO. Mr Lynch had been identified as the person to investigate the complaint against Mr Everett. We have not heard from Ms Prendergast or from Mr Lynch so there is no direct evidence that she shared these emails (or their content) with Mr Lynch at this time. However, we infer that she did. In her email of **06 May 2021 @ 14.59** [**page 103**] (where she replies to Mr Shaw) she copies in Mr Lynch (as well as Mr Tisseman and Mr Everett).

27. Later, on **06 May 2020** @ **15.06** Ms Prendergast emailed the Claimant inviting him to a meeting which was to take place on Monday **11 May 2020** at 1pm. This was to be an online meeting via Microsoft Teams [**page 98**]. The meeting was to be chaired by Mr Lynch, and was to discuss the Claimant's email of **05 May** and '*allegations raised regarding David Everett'*.

28. On **07 May 2020** @ **12.26,** Mr Tisseman replied to Ms Prendergast's email of **06 May** @ **14.59** and copied Mr Lynch into that reply [**page 103**]. It is clear to us from the emails that Mr Shaw and Mr Tisseman were effectively investigating the Claimant's conduct following his email of **05 May 2021** and that Ms Prendergast was receptive to this (this, we infer from her email of **06 May 2020** on **page 103**).

29. Mr Lynch spoke to Mr Clark directly on **07 May 2020**. There is a note made by Mr Lynch at page [**104**]. It records Mr Clark as saying that he did not speak to Mr Everett about the situation on **01 May 2020** and he did not indicate to the Claimant that he had done so.

30. Mr Lynch and Ms Prendergast interviewed the Claimant on **11 May 2020**. The notes are at pages [**110- 115**] of the bundle.

31. Mr Lynch also prepared a note of a conversation he had with Mr O'Rourke. It is dated **11 May 2020 at 16.10** [**page 108**]. The note records that Mr O'Rourke said he did not hear anything and that Mr Clark did not say that he had been made to attend work.

32. Mr Lynch also spoke to Adisa Adeniran ('AA') on **11 May 2020**. Ms Prendergast prepared a brief note of the discussion [**page 109**]. The note records AA as saying that when Mr Clark arrived on site on **01 May 2020** he said he wasn't meant to be on site as a house member was showing symptoms of COVID, that he did not want to come to work but had been told he had to. According to the note, AA said that

Mr Clark did not mention in his presence who had instructed him to attend. There were now – in addition to the Claimant - two individuals who said that Mr Clark mentioned that he had been told to come to work, namely Mr Adeniran and Mr Short.

33. Mr Lynch spoke to Mr Clark again on **12 May 2020** – Mr Lynch's note is at page [**116**]. The note records Mr Clark as saying he confirmed what they had spoken about 'last week' (i.e. on **07 May**).

34. Mr Lynch completed his investigation by Monday **18 May 2020**. He emailed the Claimant on **18 May 2020 at 1.26pm**. He said he had concluded his investigations and passed it back to Suzanne Prendergast who would be in touch to discuss the next steps [**page 145-146**]. Mr Lynch never produced what could be called a report. He made no recommendations. He did nothing other than simply pass on the notes he made of the discussions with the individuals he interviewed.

35. Although Mr Lynch had completed his investigations by lunchtime on **18 May 2020** at the latest, on **18 May 2020 at 17.07**, Mr Everett sent him a statement from Mr O'Rourke [**143-145**]. It is clear from Mr Everett's email that he and Mr Lynch have discussed something. There is no explanation from anyone on behalf of the Respondent as to how Mr O'Rourke came to provide a statement to Mr Everett in the first place. There is no record anywhere of Mr O'Rourke saying that he wished to make a complaint against the Claimant. Mr Kelly, in his oral evidence, was unable to say how the statement came about. Indeed, none of the Respondent's witnesses was able to say anything about this or the wider investigation. From the emails which we have seen exchanged between Mr Everett, Mr Tisseman and Mr Shaw, we infer that Mr O'Rourke's statement was indeed procured by Mr Everett and that Mr Lynch and Ms Prendergast knew that he was to procure it from Mr O'Rourke - we are able to infer this from Mr Everett's email to them both where he says '*as discussed, here is the statement from Rob O'Rourke'*. It is further to be noted that nowhere in that statement does Mr O'Rourke say he felt manipulated, intimidated or bullied by the Claimant.

36. The Claimant had been due to work a shift on Saturday **23 May 2020**. On Monday, **18 May** he was told by a female employee whose name was given as Kelly (or 'Kelli') and whose position was said to be 'control manager', that he would not be working the Saturday shift. The Claimant queried why he was removed from the shift and was told that it was to enable him to have some rest. This was news to the Claimant. Nobody had spoken to him about this in advance and he had not asked for nor did he require any rest.

37. Although Mr O'Rourke did not say in his statement that he felt manipulated, intimidated or bullied by the Claimant, nevertheless, on **19 May 2020** the Claimant was suspended from work. He was first notified of this by telephone @ **19.22** by Mr Lynch on the evening of **19 May**. The Claimant recorded the call covertly [**page 402**]. Mr Lynch, when asked by the Claimant, did not provide much in the way of

details regarding the reason for suspension. He said only that it was following an email in which Rob O'Rourke made a series of allegations, which basically surrounded David Everett and that Mr O'Rourke complained of intimidation and bullying (Tribunal's emphasis). The Claimant was told that due to the seriousness of the allegation, the company needed to inform him that he was suspended from duty pending a full investigation. Mr Lynch told the Claimant that he would be paid for any shifts as part of the suspension process and that he should not contact colleagues or customers on site which would be classed as a disciplinary offence in itself. He was told that he should not attend his place of work until the investigation was complete.

38. Mr Lynch told the Claimant that he was to attend an investigation meeting the following day (**20 May 2020**) at 1pm and that Ms Prendergast would send him an email confirming this. A letter of suspension was then sent to the Claimant by Ms Prendergast on the evening of **19 May 2020 @ 7.42pm** [**page 148**]. The suspension letter identified the allegation in this way:

> '*allegations of intimidating, manipulation of a witness namely Rob O'Rourke regarding an ongoing investigation regarding David Everett and Russell Clark's wife's symptoms'*.

39. The letter went on to say:

> *'Whilst suspended you shall not enter company premises nor should you make contact with any member of the company's staff, customers, clients or agents without permission from myself or a more senior manager. Failure to comply with this instruction will be regarded as an act of Gross Misconduct and may result in disciplinary action.'*

40. The investigation meeting on **20 May 2020** was conducted by telephone. Notes of the investigation meeting are at **pages [154-162].** The Claimant told Mr Lynch that he had covertly recorded conversations with Mr O'Rourke. However, we find that Mr Lynch was not interested in receiving the recordings. He said he would not accept them as the deadline had passed, that it was too late [**page 155**]. Nonetheless, the Claimant subsequently provided Ms Prendergast and Mr Lynch with copies of the recordings [**page 153**]. It has never been established that Mr Lynch even listened to the recordings. He made no reference to them in his notes and, as we have already said, he prepared nothing in the way of an investigation report.

41. Following this, the Claimant was invited to a disciplinary hearing. The invite letter was dated **22 May 2020** [**page 165-166**]. It Was sent by email to the Claimant by Ms Prendergast at **10.46am** that morning [**page 171**]. There were now three allegations:

41.1. 'you have made false allegations against a manager Mr David Everett, informing colleagues that he has forced an employee to work despite being informed that the employee's wife is experiencing symptoms of COVID-19.

41.2. Bringing the company into disrepute and reputational damage of a member of the management team.

41.3. *Allegations of intimidating, manipulation of a witness namely Rob O'Rourke regarding an ongoing investigation regarding David Everett and Russell Clark's wife's symptoms'*.

42. The Claimant responded on **22 May 2020** @ 15:12 [**page 169-171**] saying among other things that he felt he was being made a scapegoat and that the investigation was a calculated attempt to tarnish his image. The Disciplinary Hearing was scheduled to take place by telephone (because of the then COVID-19 situation) on Wednesday **27 May 2020 at 11am**. However, the invite letter did not say **how** this was to happen – whether the Respondent would contact him at that time, whether he was to contact the Respondent, whether everyone was to dial into a number – there was no indication of the practical steps required to conduct the hearing other than to say that it would be by telephone.

43. Mr Kelly was to chair the meeting and to decide on the outcome. He was to be accompanied by a member of the HR department to take notes. The invite letter attached copies of the notes of the investigation meetings and statements made of the interviews with witnesses. The Claimant was told that he was entitled to be accompanied by a work colleague or a trade union officer. The letter did not say how the colleague's or trade union officer's attendance was to be facilitated by telephone, although Ms Prendergast did ask the Claimant to let her know prior to the meeting if he intended to be accompanied.

44. Following receipt of the disciplinary invite letter (just under 2 ½ hours after it was sent), the Claimant attempted to call Ms Prendergast on the number she had provided in the suspension letter [at **page 148**]. On **page 164** is a screenshot of the Claimant's phone which shows that on **22 May 2020 at 13:12** he dialled Ms Prendergast's mobile number. Against the time of **13:12** it says '*cancelled call*'. It was agreed that this signifies that the call was cancelled by the Claimant either prior to anyone answering or prior to connecting to an automated voice message.

45. The Claimant says that the phone rang and rang so he cancelled it (hung up) and that it did not go into Ms Prendergast's voice mail. As indicated above, we have not heard from Ms Prendergast in these proceedings. There is no evidence that she had set up voicemail or that it was activated at the time. We have only the Claimant's evidence that her voice mail was not engaged. We accept the Claimant's evidence that when he rang, it did not go to voice mail and that he hung up. We are unable to say how long it rang for before he hung up. It may well be that, if he had waited enough time, it would have connected to an automated voice

message – we simply do not know. However, we accept that he did not hang up **immediately** and that it rang a few times before he cancelled. However, we are satisfied that he made no further attempt to contact Ms Prendergast either by telephone or email to seek permission to attend site.

46. The Claimant emailed Ms Prendergast at **15:12** the same afternoon [**page 169-170**]. In that email he expressed his concerns that the investigation was a 'reprisal' and that he was being made a 'scapegoat'. He made a number of points about the allegation of intimidation of Mr O'Rourke.

47. The Claimant understood that the terms of his suspension forbade him to attend site without permission. That, he says, was why he tried to ring Ms Prendergast on Friday, **22 May 2020**. He wanted to ask her permission to attend the site. He said in evidence that, because he could not get hold of her, he took the decision to attend the site anyway to collect some personal belongings, including medicine and to find a companion for the disciplinary hearing. We do not accept that the main reason he attended site was to collect medication. We accept that when he attended site, the Claimant wished to and reasonably needed to collect an ointment for pain in his knee (a traditional African herbal medicine) and some vitamin C and D - all of which he kept in his locker at work. However, we conclude that was not the primary purpose of his visit to site on **26 May**, some 4 days after the letter of **22 May** and some 7 days after his suspension. The primary purpose of his visit on **26 May 2020** day was something else – to find a companion; the medication was, we find, secondary and something which he decided to collect once he attended site. The Claimant could easily have emailed or called again about his medication, had that been his primary concern, but he did not.

48. The Claimant attended the site, first on **26th May 2020** and again on **27th May 2020**. On the first visit, he collected his medicine from his locker. As we have already found, that was a secondary reason for his visit. The primary reason, we find, was to see if he could find a colleague willing to accompany him at the forthcoming disciplinary hearing. The hearing scheduled for **27th May 2020**, as we have noted, was to be undertaken by telephone. As we have also noted, other than to ask who was to accompany him, the letter gave no guidance on the logistics – for example, how his chosen colleague might engage in the hearing by telephone. Therefore, on **26th May**, the Claimant went to the site to find a companion to accompany him at the hearing. When he got there, he spoke to Adisa Adeniran. Mr Adeniran agreed to accompany the Claimant at the hearing. However, he was scheduled to be at work the following day. Therefore, the Claimant said that he would return then. His intention was that they would find a room on site, where he and Adisa could sit together and both attend the hearing by telephone. He spoke to Mr Steve Claxton to ask if there would be a place where he could go without distractions. However, the Claimant did not inform Ms Prendergast that he intended to be accompanied by Adisa, despite having been asked to in the letter setting the date for the disciplinary hearing nor did he ask her for permission to attend site.

49. When on site on **26th May 2020**, the Claimant also spoke briefly to Emma Harrison (HR People Manager, ABP Wessex).

50. As we have noted and found, the second visit to site (**27th May 2020**) was on the day of the scheduled disciplinary hearing. The invite letter stated that the hearing would begin at **11am** that day. Mr Kelly was ready to conduct the hearing at that time in the presence of an HR Manager, Ms Anna Bowlt. He had, in advance, read the material gathered by Mr Lynch at **pages [154-162]**. He had also listened to 3 covert recordings made by and provided by the Claimant – those were recordings of workplace conversations between the Claimant and Mr O'Rourke. However, he had not seen the email exchanges involving Mr Tisseman, Mr Shaw, Mr Everett (those we have described earlier in our findings and which are dismissive of the Claimant's complaint and mark him as being out of control) and Mr Lynch.

51. On the morning of the disciplinary hearing (**27th May 2020**), Mr Kelly called the Claimant three times, shortly after 11am but got no response [**page 176**]. Having received no response, he emailed Ms Prendergast at 11.29am [**page 177**] asking how to proceed. Although we have not seen the advice from Ms Prendergast, we infer that the advice was to reschedule the disciplinary hearing – because that is what happened. It was rescheduled for **3rd June 2020**. The Claimant did not answer Mr Kelly's calls on **27th May 2020** because, when the phone rang, he saw that it was from a 'number withheld'. As he had been expecting a call from the usual number, he did not answer any of the 'withheld number' calls in order to keep his line clear.

52. On **27th May 2020 @ 13.16**, Mr O'Rourke emailed 'control room' (see additional disclosure provided to ET by R on **01 September 2021 @10.55** and referred to in paragraph 6 above). Mr O'Rourke wrote that the Claimant had turned up on site on **26th May 2020** @ 12.40 collected his stuff at 12.50 spoke to Peter Short, then around 1.10pm he was walking by himself towards engineering to speak to Steve Claxton (head of engineering) came back to security at 1.40 spoke to Adisa outside for a bit and said he would be back tomorrow.

53. On the same day, indeed coincidentally at the same time (**27 May 2020** @ 1.16pm), Emma Harrison emailed John Shaw (with a copy to 'control room' and Peter Short saying: '*Hi John, could I please have an update with regards to Phillip. I have heard he has left the organisation and would like to know why please if this is the case*.' (**page 174**).

54. Mr Tisseman replied to that email on **27 May 2020 @ 2.33pm** [**page 173-174**]. Within that email, he said:

> *"Peter, as you are aware we have been investigating the recent incidents involving security officers and their conduct…and inevitably this investigation would centre around Phillip as he appeared to be the focal point. During the course of this investigation some behaviours and actions displayed by Phillip*

towards his colleagues, the Protector Management Team and in the conduct of his duties at ABP Wessex, came to light which were deemed to constitute Gross Misconduct; and as a result Phillip was suspended pending his disciplinary hearing…..

Furthermore, as part of the suspension it was made clear to Phillip that he should not go to ABP Wessex, make contact with any of his colleagues on site or an ABP Wessex employee until this has been brought to a conclusion. I have just found out that Phillip has been on site and the Company would like to ask him why he has gone against this express instruction not to."

55. Ms Harrison responded that same day at 16:58 (see the additional disclosure of **01 September 2021** referred to in paragraph 7 above). She said:

"Sorry to hear all this is going on, I was not in on Friday, but noticed he was not at the desk on Tuesday or today. As always within a factory there is hearsay and gossip but as I had not seen him, I though I would ask hence my question to you.

you are correct Phillip did briefly come on site this afternoon, it was more of a courtesy call to myself, to explain why he was not at his post and mentioned he had a hearing at 1pm and was awaiting your telephone call which never occurred, but looking at the time stated below, to the one he told me, I'm not sure if there had been a mix up."

56. The following day, **28 May 2020 at 9am** the Claimant emailed Ms Prendergast [**page 180-181**]. He said that he understood he had an appointment at 1pm the day before and that he waited for about an hour but never received a call. What we find confusing about this email from the Claimant is that, in his evidence, he said that he saw calls come in from a 'withheld number' and that did not answer them because he wanted to keep the line clear for the Respondent's call. However, those calls (from Mr Kelly) were made just after **11am**. In his email of **28 May** [**page 180-181**] the Claimant said he was waiting for the call **at 1pm** and that he waited for about an hour. We could not understand, in that case, why - if he was expecting his employer's call at 1pm - he was keeping his line clear at 11am. That made no sense – unless he had decided to keep his line clear for two hours prior to the start of the disciplinary hearing or he was not telling the truth. We can think of no reason why the Claimant would not answer calls at 11am had he known it was from the Respondent. It was not to his benefit in any way to ignore the calls and it is clear from Emma Harrison's email to Mr Tisseman on **27 May 2020** that he told her that he was awaiting a phone call. We find that the Claimant was genuinely keeping the line clear and whilst it may be surprising that he did so from 11am when expecting a call at 1pm, nevertheless, that is what he did, wisely or otherwise.

57. Ms Prendergast responded to the Claimant's email of **28 May 2020** that same morning at 11.46am [**page 180**]. She explained that the meeting was supposed to

have been at 11am, not 1pm. She also said that the Respondent has been advised that the Claimant visited ABP meats the day before (27th) '*which means that you have breached the terms of your suspension letter'*. She added that the Claimant was required to attend an investigation meeting on **Friday 29th May at 10.30am** by telephone to be conducted by Simon Lynch to investigate this allegation. She emailed again @ **16.20** asking him to 'confirm his attendance for tomorrow's meeting by telephone' [**page 183]**.

58. The Claimant did not attend the investigation meeting because he had not seen Ms Prendergast's email. He emailed her on **29th May 2020** @ **12.10** to say '*I just checked my email and I found your letter. Can we make it Monday please?'* [**page 183**]. However, that was after the meeting had been scheduled to take place. The Claimant noted that he had some missed calls so he contacted the control room. A person called 'Kev' emailed Ms Prendergast on **29 May 2020** @ **12:49** to say that he had received a call from the Claimant who had asked '*if anyone had tried to contact him as he has had missed calls'* **[page 184]**. We were never shown any reply from Ms Prendergast to the Claimant's email on **page 183** asking for the investigation meeting to be rearranged. We infer that none was sent and that Ms Prendergast and Mr Lynch did not subsequently attempt to understand from the Claimant why he had not attended the call on **29 May 2020**. Despite receiving his email on **page 183** in which he explained that he had only just seen her email, neither she nor Mr Lynch sought to rearrange the interview.

59. Instead, Ms Prendergast wrote to the Claimant on **29 May 2020 @1.30pm** rearranging the disciplinary hearing by telephone for **03 June 2020 @ 10am** [**page 185-187**]. In the letter, she referred to a new allegation – a fourth one - as follows:

> *"you were advised by email on 28th May 2020 that you were required to attend an investigation meeting by telephone due to a new allegation that had come to light."*
>
> ***'On 26th and 27th May 2020 we have been advised that you attended site to speak with Robert O'Rourke and the clients Peter Short, Steve Claxton and Emma Harrison and collected some of your belongings, this action is in breach of the terms of your paid suspension set out in my letter dated 19th May 2020'***
>
> *"As you failed to attend the investigation meeting to address this new allegation (in breach of the terms of your suspension) please be advised that this investigation was held in your absence"*.

60. By '*held in your absence'*, Ms Prendergast was referring to the fact that, on **29th May 2021**, Mr Lynch and she met in the Claimant's absence and Mr Lynch completed the document called 'Investigation Meeting Record' which is found at **pages [188-192]**. Given the purpose of the investigation meeting was to hear from the Claimant as to why he attended on site, we struggle to understand how the

Respondent can say that the matter was investigated in the Claimant's absence. All that happened was that Mr Lynch noted down on paper the sequence of events. He also noted on **page [189]** that he had called at 10.30, 10.32, 10.38 and 10.50, leaving one voice message. Those were the 'missed calls' referred to by 'Kev' on **page [184]**.

61. Ms Prendergast's letter of **29 May 2020** does not clearly say that, at the disciplinary hearing, the fourth allegation would be considered. There is ambiguity in the letter. It says that '*the purpose of the hearing is to address the allegations below'*. It then sets out three allegations (the original allegations). It is then followed by another paragraph under which is set out the fourth allegation (breach of suspension).

62. Mr Kelly understood from the letter that the fourth allegation was to be addressed at the disciplinary hearing and he expected the Claimant to have understood that as well. He took the reference to '*the allegations below'* as being a reference to all four. Whatever Mr Kelly believed, we conclude that the Claimant did not understand that the matter was to be discussed and determined at the disciplinary hearing. We find that the Claimant understood the first three bullet points on page [**185]** to be the subject of the disciplinary hearing but not the fourth. All that the letter says in relation to the fourth bullet point is that there was a new allegation and that the investigation was held in his absence.

63. We are satisfied that Mr Kelly genuinely read the letter differently. He understood that the fourth bullet point was to be a subject of the disciplinary hearing (and that may also have been the intention of Ms Prendergast) and that he read the sentence '*the purpose of the hearing is to address the allegations below'* as including all four bullet points. However, that was not at all clear to the Claimant.

The disciplinary hearing

64. The disciplinary hearing took place at 10am by telephone on **03 June 2020**. The Claimant said at the outset that he was recording the hearing and Mr Kelly agreed he could do so. Neither party produced a transcript of the recording. All we have is the notes produced by the Respondent at **page [194]**.

65. The hearing about lasted 10 minutes (in fact, 10 minutes 38 seconds according to the recording). Towards the end of the hearing, the Claimant said that his attendance at site had been essential, that he had things to collect, namely his medication. Mr Kelly did not engage with what the Claimant said about this. He did not enquire as to the nature of the medication or why the Claimant believed it necessary to attend the site to collect it on **26th May**. He did not ask about **26th May** at all and he discussed only **27th May 2020** and even then, only briefly. He did not ask whether the Claimant had attempted to speak to anyone to seek permission to attend site. Although Mr O'Rourke, Mr Short, Mr Claxton and Ms Harrison were mentioned in the allegation (specifically that the Claimant had attended site to speak to these people), Mr Kelly did not even get into this. He did not enquire of the Claimant who he spoke to. He did not seek to understand whether the Claimant

had tried to interfere with the investigation or disciplinary process. He did not in any way seek to understand what COVID-19 precautions the Claimant took on site and in fact made no reference at all to COVID risks or concerns. At the end of the hearing, Mr Kelly dismissed the Claimant. He did so without pausing to allow any time for deliberation or reflection. The record of his note on **page 194** says that he had *'no choice but to terminate your contract with company with immediate effect. You have not demonstrated that journey was essential and put others at risk including the customer and yourself*'. Although he said in cross examination that he took account of the Claimant's length of service we do not accept that he did. We find that he had made up his mind almost immediately upon hearing the Claimant admit to attending site without permission.

66. In his oral evidence to the Tribunal, Mr Kelly said that, while he did not discuss the Claimant's visit to site on **26th May 2020**, one visit was enough to warrant summary dismissal. He felt that it was unnecessary to get into the **26th May** visit. If the Claimant visited twice without permission, that only served to amplify the gravity of the matter in his view. As we have found, Mr Kelly accepted that he did not know or ascertain what the Claimant had retrieved when he visited the site. He did not know or seek to ascertain who the Claimant spoke to when he attended site. He did not know or seek to ascertain whether the Claimant attempted to interfere with the investigation into the matters regarding his suspension. He did not ask the Claimant or anyone else about these things. He did not attempt to understand the Claimant's underlying rationale or thinking. He did not regard these matters as relevant because of the simple fact that the Claimant went to site while on suspension without having permission to do so. Mr Kelly did not ask the Claimant about the matters referred to in paragraph 11a of his witness statement (what contact he had); he did not have anything from the client in relation to what he says in paragraph 11b of his witness statement nor did he ask the Claimant about this; he never put to the Claimant the matters referred to in paragraph 11c of his witness statement (confidentiality) and in his oral evidence, Mr Kelly accepted there was never any reference to this; the Claimant was not given a copy of the COVID risk assessment referred to in paragraph 11d of Mr Kelly's witness statement nor was the Claimant asked any questions about it. Further, Mr Kelly did not seek to understand who the Claimant contacted and what precautions were taken by him.

67. A letter of dismissal dated **04 June 2020** was sent to the Claimant **pages [202-203**]. The letter sets out the three allegations relating to Mr Everett and Mr O'Rourke and the fourth relating to his attendance on site on **26th and 27th May 2020**. Mr Kelly does not address the first three allegations at all and he made no decision in respect of them. In respect of the fourth allegation he wrote:

> *"You have admitted to visiting site and having contact with TPG staff and the customer while suspended and advised by the company against doing so in your suspension letter dated 19th May 2020.*

You have failed to provide an acceptable explanation for this contact, which not only contravenes the terms of your suspension, it also goes against The Protector Group's COVID19 Risk Assessment which you have acknowledged receiving and public health advice.

Because of this serious breach I feel there are no other options available to me other than dismissal.

Therefore, I have decided to take the severest sanction an employer can take against an employee and to summarily dismiss you with effect from 3rd June 2020. You are not entitled to notice pay…"

68. The Claimant was informed in the letter that he that he had a right to appeal against the decision which he should send to Ms Prendergast within 5 working days of receipt of the letter of dismissal stating reasons for the appeal. The Claimant did appeal and set out his grounds at **pages [204-207]**. Most of the grounds relate to the first three allegations. The Claimant sets out his appeal in relation to the fourth allegation in paragraphs 4 and 5, **page [205**]. He gave two explanations:

    (1) That he needed to obtain medication and

    (2) That he needed to find someone to accompany him at the disciplinary hearing.

69. As to the first, he explained what medication and vitamins he collected and why. As to the second, he said that, on **26th May 2020** he had found someone, Adisa, who had agreed to accompany him on **27th May 2020**. He disputed that his reasons for attending warranted summary dismissal for gross misconduct and that there were justifiable reasons for his visits

70. The appeal hearing was set for Monday **22 June 2020** @ 3pm by telephone and was to be chaired by John Hyde, Mobile Services Director, accompanied by Ms Bowlt of HR [**page 208**]. The Claimant was asked by Mr Hyde why he did not contact the company before attending site on **27th Ma**y. He said that he rang Suzanne (Prendergast), that nobody answered. He explained that he wished to collect his medication and to find someone to be with him for the disciplinary hearing [**page 212**]. At the end of the hearing, Mr Hyde said '*I will get back to you after investigation'* [**page 213**].

71. However, Mr Hyde undertook no further investigation, nor did he direct anyone to investigate anything further.

72. My Hyde accepted in evidence that the Claimant had made a call to Suzanne Prendergast to speak about attending site. He was not in a position to say how many times the Claimant did this but he was prepared to accept at face value that he had attempted certainly once. In evidence he said that he accepted that the

Claimant had a legitimate reason to go to site. The appeal was not upheld. This was communicated to the Claimant by letter dated **30th June 2020** [**pages 216-217**].

73. The letter contains a confusingly worded reference to the first three allegations but in our judgement, this is of no significance. It is likely that Mr Hyde referred to them simply because the Claimant himself had raised these points in his letter of appeal against Mr Kelly's decision. Mr Hyde referred to them because he did not agree with what the Claimant said in the letter of appeal – even though they had no bearing on the appeal decision itself. As regards the matter for which Mr Kelly dismissed the Claimant (the fourth allegation regarding breach of the terms of suspension) Mr Hyde said as follows:

> *"points 4 and 5*
> *I agree that the trip to site may have been essential to collect medicine, however you should have contacted management of the Protector Group for permission to do so as per the terms of your suspension letter, this could have been done by telephone or email. You then not only collected your medicine and left but continued to see the customer.*
>
> *Point 6*
> *I accept that you had tried to contact The Protector Group but you should have been in touch earlier than giving the notice you had received."*

74. In his oral evidence before the Tribunal Mr Hyde confirmed that although the Claimant had a legitimate reason for attending the site on **26th May** while on suspension (namely to collect medication and find representation), this was irrelevant. Mr Hyde regarded the terms of suspension as being clear in that the Claimant needed permission to attend. As the Claimant did not have permission, Mr Hyde viewed his attendance at site as gross misconduct. He believed and proceeded on the basis that if something was gross misconduct it resulted in dismissal – irrespective of the explanation. As regards Mr Hyde, it was, we find, in his mind an open and shut case of gross misconduct and therefore summary dismissal. He gave no consideration to alternatives.

Holiday entitlement

75. There was a dispute between the parties as to whether the Claimant was owed anything in respect of accrued but untaken holidays. We make the following findings in relation to that dispute.

76. The Claimant's contract of employment is dated **21st October 2008** [**pages 60 – 68**]. Section 5.1 ('remuneration') provided that he was to be paid a basic hourly rate of pay which 'will not be below the legislated minimum rate per hour.' Section 13 of the contract is concerned with 'holidays'. The relevant sections are as follows:

76.1. Section 13.1: 'Employees who work 40 hours or more per week are entitled to receive 24 days holiday inclusive of bank holidays per year (paid on their normal rate of pay as defined by law from time to time). Paid holiday entitlement accrues at a rate of 2.00 days per calendar month.

76.2. Section 13.3: 'The holiday year runs from 1st October to 30th September. Holiday will not be carried over to the following year unless authorised by Company management. No payment in lieu of unused holidays will be made.

77. In about 2019 to 2020, the 'holiday year' changed from October to September to 01 April to 31 March. Nothing else changed. The Claimant was, therefore, entitled to 28 days a year, including bank holidays. As per his contract, he was contractually entitled to carry over holidays with the express permission of a manager. We find that he was given that permission by Mr Tisseman. There is no evidence to the contrary and we accept the Claimant's evidence to that effect. The Claimant had emailed Ms Todd on **9th July 2020** to say that Mr Tisseman had agreed to this [**page 219**]. She did not speak to Mr Tisseman about it. She was unable to challenge the Claimant's account.

78. As at the date of termination of employment, he was owed 6.58 days holiday. His pay was calculated on an hourly basis, which at the relevant time was £8.72 an hour. In the period leading up to his suspension the Claimant had been working 6 days a week and was expecting to, and would have, worked 6 days a week up to the date of termination of employment (had he not been suspended). Ms Todd was unable to challenge the information set out on **page 46** of the bundle.

Wages

79. There was also a dispute between the parties as to whether the Claimant was owed any additional payment by way of wages in the period **20 May 2020** and **03 June 2020** (the period from suspension to dismissal). In that period there were 13 working days - a week consisting of Monday to Saturday. The Claimant's hourly rate was £8.72 and he worked 12 hour days prior to the suspension. We find that he was expecting and was expected to continue working Saturdays during that period (had he not been suspended).

80. Ms Todd said that, when she calculated the Claimant's pay in this period, she worked on the basis that he would have worked 5 days a week and not 6 days (the 6th day being a Saturday). She took his average weekly wage looking back over a period of 12 weeks. However, she was unaware that he had recently started working Saturdays and that he would have been working Saturdays during that period. In answer to a question from Ms Jackson about how security guards pay was normally calculated, Ms Todd said that normally she would look back over the number of hours in the previous month and that when they pay on the 10th of the month the pay is based on the number of hours worked in the previous month, 1st to 31st. However, on this occasion, she processed the Claimant as a leaver, and

took an averaging approach. She calculated a daily rate (£92.09) for a 5 day week based on the Claimant's P60, amounting to £1,013 for 11 days.

81. We find that the Claimant would have worked the two Saturdays during the period **20 May** and **03 June 2020**, amounting to 13 days of 12 hour shifts at the rate of £8.72 an hour, which equates to £104.64 x 13 = £1,360.32. There is a shortfall of £347.32.

Relevant law

Public interest disclosures

82. The ERA provides two forms of protection to 'whistle-blowers': (1) protection from detriment under s47B and (2) protection from dismissal under s103A.

83. Section **43B ERA** defines a 'qualifying disclosure'. If a disclosure is a qualifying disclosure then it becomes 'protected' if (among other things) it is made to the employer (s43(c)(1)(a)).

84. By **s47B ERA** a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

85. By **s103A** ERA 1996, if the reason or principal reason for dismissal is that the employee made a protected disclosure, that dismissal is regarded as being automatically unfair.

86. The law protects the worker only against the act of disclosure. If the principal reason for dismissal is not the act or fact of disclosure, then there can be no unfair dismissal contrary to s103A ERA. If the worker was not subjected to a detriment because he made the disclosure, there is no contravention of section **47B**.

Detriment cases

87. The concept of 'detriment' is very broad and must be judged from the view point of the worker, albeit the test is not wholly subjective. A detriment is established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. An unjustified sense of grievance cannot amount to 'detriment': **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R.R. 337 HL, @ para 35; **Jesudason v Alder Hay Children's NHS Foundation Trust** [2020] IRLR 374, CA @ paras 27 and 27.

Causation and burden of proof

88. Causation **under s47B** has two elements:

    a. Was the worker *subjected* to the *detriment* by the employer?

b. Was the worker subjected to that detriment *because* he or she had made a protected disclosure?

89. Section **48(2)** provides that:

> *'On a complaint under subsection...(1A) [a complaint of detriment in contravention of section 47B] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.'*

90. The Claimant must establish on the balance of probabilities that he made a protected disclosure and that he was subjected to a detriment by the Respondent. If he also establishes that there is an arguable ('prima facie') case of favourable treatment/detriment that requires to be explained, then the burden shifts to the respondent to show on the balance of probabilities that the ground on which the act or deliberate failure to act was done was not on the grounds that the claimant had made the disclosure. This requires it to show that the disclosure did not materially influence (in the sense of being more than a trivial influence) its treatment of the claimant: **Fecitt v NHS Manchester** [2012] I.C.R. 372.

91. Section 48(2) does not operate in the same way as section 136 Equality Act 2010. The Tribunal is not obliged or required to find against a respondent if it does not satisfy the burden under section 48(2). The approach which the Tribunal must take is as explained by the Court of Appeal in **Serco Ltd v Dahou** [2017] IRLR 81 (case involving detriment on trade union grounds) and **Kuzel v Roche Products Ltd** [2008] IRLR 530 (a case involving dismissal on 'whistleblowing' grounds). Therefore, if a respondent fails to show an innocent ground or purpose for its treatment of the claimant, the Tribunal **may** draw an adverse inference and conclude that it the treatment was done on the ground that the claimant had made the protected disclosure. If a Tribunal rejects an employer's explanation in a case under section 48, this rejection may give credence to the reason or ground advanced by the claimant and the tribunal may find that to be the reason but it is not obliged to do so. This will depend on findings of fact and what inferences may properly be drawn from those facts. It remains open to the Tribunal to conclude that the reason or ground for treatment was not that advanced by either party.

Dismissal Cases

The reason for dismissal

92. A claimant will only succeed in a claim of **s103A** unfair dismissal if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure. A 'principal' reason is the reason that operated in the employer's mind at the time of the dismissal Adopting what Cairns LJ said about the reason or dismissal in an unfair dismissal claim:

> *"A reason [for an act or omission] is a set of facts known to an employer, or it may be of beliefs held by him, which cause him to [act or refrain from acting] "* (***Abernethy v Mott Hay and Anderson*** *[1974] IRLR 213)*

93. If the fact that an employee made a protected disclosure(s) was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under **s103A** will fail and the Tribunal will have to determine the claim of 'general' unfair dismissal (within section **98(4)** ERA).

Reason for dismissal and burden of proof

94. Where the employee has been employed by the Respondent for more than two continuous year and where he alleges a dismissal in contravention of section **103A**, he is required to show that there is an issue that warrants investigation and which is capable of establishing the automatically unfair reason advanced: **Kuzel v Roche Products Ltd** [2008] I.C.R. 799, CA; **Maund v Penwith District Council** [1984] I.C.R. 143, CA. He is said to bear an 'evidential burden' in this respect. If the evidential burden is satisfied, the Respondent has the 'legal burden' of showing that the principal reason for dismissal was that advanced - and not the asserted impermissible reason.

Attribution or imputation of the motivation of individuals to the employer

95. The reference to 'reason' in the ERA is to the employer's reason. In most cases, it will not be difficult to establish the reason because the first (and usually last) port of call is the reason relied on by the manager who made the decision to dismiss. However, the position is more complex where there is an allegation that the dismissing manager has been manipulated or misled by another manager who is motivated to have the employee dismissed by the fact that the employee has made a protected disclosure – referred to by Underhill LJ as an 'Iago case'. This difficult issue was addressed by the Supreme Court In the case of **Royal Mail Group Ltd v Jhuti** [2020] I.C.R. 731.

96. The Supreme Court approved of the classic definition of a 'reason' for dismissal in **Abernethy v Mott, Hay and Anderson**, observing that the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason. The SC agreed that it is too narrow an approach to concentrate only on the decision-maker and there may be cases where a wider inquiry is appropriate.

97. In paragraph 60, Lord Wilson said:

> *"In the present case, however, the reason for the dismissal given in good faith by the [decision-maker] turns out to have been bogus. If a person in the hierarchy of responsibility above the employee…determines that, for reason A (here the making of protected disclosures) the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy6 of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker."*

98. Thus, when *dealing* with a corporate employer, depending on the facts, it is no longer simply a question of attributing to it the state of mind of the actual decision-maker. In an appropriate case, and always depending on the facts, the state of mind of a person other than the decision-maker may be attributed to the employer. This was, Lord Wilson added in paragraph 61, a 'narrow qualification' to the decision in **Orr v Milton Keynes Council** [2011] I.C.R. 704.

99. In the case of **Kong v Gulf International Bank (UK) Ltd** [2021] 9 WLUK 125, the EAT provided tribunals with some further guidance on the principles of attribution. HHJ Auerbach observed that **Jhuti** represented a limited exception to the general position that only the decision-maker's motivation was relevant in determining the 'reason' for dismissal. For the **Jhuti** principle to apply, the decision-maker had to be particularly dependent on the other person ('Iago') as the source of the underlying facts and information and the other person's role or position had to be such that their motivation could be attributed to the employer (see paragraph 72 of the judgment).

Unfair dismissal – the principal reason for dismissal

100. It is for the employer to show the principal reason for dismissal and that it is a reason falling within section **98(2)** or that it is for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

101. The reason or principal reason for a dismissal is a question of fact for the employment tribunal. As referred to above, a reason for dismissal '*is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*': **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, CA. In a more recent analysis in **Croydon Health Services NHS Trust v Beatt** [2017] ICR 1240, CA, Underhill LJ said that the 'reason' for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker's motivation.

Section 98(4): reasonableness

102. Section 98(4) provides as follows:

'……the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and

(b) Shall be determined in accordance with equity and the substantial merits of the case.'

Conduct cases: reason and reasonableness

103. If it is established that the reason for dismissal relates to conduct the next question is whether the employer has acted reasonably in treating that reason as a sufficient reason for dismissal – s98(4) ERA 1996. It is not for the employer to prove that it acted reasonably in this regard. The Tribunal must not put itself in the position of the employer and must confine its consideration of the facts to those found by the employer at the time of dismissal and not its own findings of fact regarding the employee's conduct: **London Ambulance Service NHS Trust v small** [2009] IRLR 563.

104. The approach to be taken is the well-known band of reasonable responses, summarised by the EAT in **Iceland v Frozen Foods Ltd v Jones** [1983] I.C.R. 17. The Tribunal must take as the starting point the words of s98(4). It must determine whether, in the particular circumstances, the decision to dismiss was within the band of reasonable responses which a reasonable employer might have adopted. In assessing the reasonableness of the response, it must do so by reference to the objective standard of the hypothetical reasonable employer (**Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387, CA @ para 49). In other words, could a reasonable employer have dismissed in the particular circumstances of the case? The 'range of responses' approach allows that, faced with the same facts, some employers might dismiss whilst some might not. The Tribunal must take care not to substitute its own view as to what was the right course of action. The conduct of a person other than the decision-maker may be relevant to the fairness of a dismissal: **Uddin v London Borough of Ealing** [2020] IRLR. 332, EAT.

105. In misconduct cases, the approach which a Tribunal takes is guided by the well known decision of **British Home Stores v Burchell** [1978] IRLR 379, EAT. There are three questions:

(i) Did the employer carry out a reasonable investigation?

(ii) Did the employer believe that the employee was guilty of the conduct complained of?

(iii) Did the employer have reasonable grounds for that belief?

106. In misconduct unfair dismissal cases, in determining the question of fairness, it is unnecessary for the Tribunal to embark on any analysis of whether the conduct for which the employee was dismissed amounts to gross misconduct. However, where an employer dismisses an employee for gross misconduct, it is relevant to ask whether the employer acted reasonably in characterising the conduct as gross misconduct – and this means inevitably asking whether the conduct for which the employee was dismissed was capable of amounting to gross misconduct – see **Sandwell & West Birmingham Hospitals NHS Trust v Westwood**

(UKEAT/0032/09/LA) [2009] and **Eastland Homes Partnership Ltd v Cunningham** (EAT/0272/13).

Fair procedures

107. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the Claimant. It requires the Tribunal to apply an objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions. The Tribunal should consider procedural issues together with the reason for the dismissal as it has found it to be and not as separate issues as the two impact on each other: **Taylor v OCS Group Ltd** [2006] I.C.R. 1602, CA @ para 48.

108. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: **Sainsbury plc v Hitt** [2003] I.C.R. 111, CA. The fairness of a process which results in dismissal must be assessed overall.

109. It is a fundamental part of a fair disciplinary procedure that an employee knows the case against him. Fairness requires that someone accused should know the case to be me; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence and to adduce his own evidence and argue his case: **Spink v Express Foods Limited** [1990] IRLR 320, EAT.

110. In **Strouthos v London Underground Limited**, Pill LJ said at paragraph 38:

> *"…it does appear to me to be basic to legal procedures, whether criminal or disciplinary, that a defendant or employee should be found guilty, if he is found guilty at all, only of a charge which is put to him…It is to be emphasised that it is wished to keep proceedings as informal as possible, but that does, in my judgment, destroy the basic proposition that a defendant should only be found guilty of the offence with which he has been charged."*

Polkey

111. What is known as 'the Polkey principle' (**Polkey v AD Dayton Services** [1988] I.C.R. 142, HL) is an example of the application of section 123(1). Under this section the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. A tribunal may reduce the

compensatory award where the unfairly dismissed employee could have been dismissed fairly at a later stage or if a proper and fair procedure had been followed. Thus the 'Polkey' exercise is predictive in the sense that the Tribunal should consider whether the particular employer could have dismissed fairly and if so the chances whether it would have done so. The tribunal is not deciding the matter on balance. It is not to ask what it would have done if it were the employer. It is assessing the chances of what the actual employer would have done: **Hill v Governing Body of Great Tey Primary School** [2013] I.C.R. 691, EAT.

112. Whilst the Tribunal will undertake the exercise based on an evaluation of the evidence before it, the exercise almost inevitably involves a consideration of uncertainties and an element of speculation. It is not an all or nothing exercise. However, the onus is on the Respondent to adduce relevant evidence to show that the dismissal would have occurred in any event – albeit the Tribunal must have regard to all the evidence, including any evidence from the employee himself. The principles are most helpfully summarised in the judgment of Elias J (as he was) in **Software 2000 Ltd v Andrews** [2007] I.C.R. 825, EAT (paragraphs 53 and 54). In stating the principles, Elias J observed that there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

Contributory conduct

113. If a dismissal is found to be unfair, under section 123(6) ERA where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding even in cases where the parties do not raise it as an issue (**Swallow Security Services Ltd v Millicent** [2009] ALL ER (D) 299, EAT). The relevant conduct must be culpable or blameworthy and (for the purposes of considering a reduction of the compensatory award) must have actually caused or contributed to the dismissal: **Nelson v BBC (No2)** [1980] I.C.R. 110, CA. For the purposes of the compensatory award there must be a causal connection between the conduct and the dismissal. The conduct must be to some extent culpable or blameworthy (**Nelson v BBC (No.2)** [1980] I.C.R. 110, CA). Langstaff J offered tribunals some guidance in the case of **Steen v ASP Packaging** [2014] I.C.R. 56, EAT, namely that the following questions should be asked: (1) what was the conduct in question? (2) was it blameworthy? (3) did it cause or contribute to the dismissal? (for the purposes of the compensatory award) (4) to what extent should the award be reduced?

114. There is an equivalent provision for reduction of the basic award, section 122(2) which states that '*where the tribunal considers that any conduct of the complainant before the dismissal…was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly*'. The tribunal has a wider discretion to

reduce the basic award on grounds of any conduct of the employee prior to dismissal. It is not limited to conduct which has caused or contributed to the dismissal.

115. Unlike the position under section 98(4) ERA where the Tribunal must confine its consideration of the facts to those found by the employer at the time of the dismissal, the position is different when the Tribunal comes to consider whether, and if so to what extent, the employee might be said to have contributed to the dismissal. In this regard, the Tribunal is bound to come to its own view on the evidence before it. Decisions on contributory fault are for the Tribunal to make, if a decision is held to be unfair. It is the claimant's conduct that is in issue and not that of any others. The conduct must be established by the evidence.

Wrongful dismissal – breach of contract

116. A dismissal without notice, or with inadequate notice, is wrongful (that is, in breach of contract) unless the employer can show that summary dismissal was justified because the employee had repudiated the contract. If it is unable to show this, the employee will be entitled to claim damages in respect of the contractual notice period. Only repudiatory breaches justify summary dismissal.

117. An employer is entitled to terminate a contract without notice in circumstances where the employee has committed an act of gross misconduct. It is for the employer to prove on the balance of probabilities whether the employee has committed gross misconduct. Whether an employee has committed gross misconduct entitling the employer to terminate summarily is a question of fact in each case. However, the courts have considered when 'misconduct' might properly be described as 'gross': **Neary v Dean of Westminster** IRLR [1999] 288 (para 22). In **Neary**, where Lord Jauncey of Tulichettle stated that the conduct 'must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment'. This was approved by the Court of Appeal in **Briscoe v Lubrizol Ltd** [2002] IRLR 707. The employee's conduct must be viewed objectively, so that an employee may repudiate the contract whether or not he so intended. Whilst employers (and many of the authorities) speak in terms of 'gross' misconduct, the underlying legal test is whether the conduct was repudiatory.

118. There is no rule of law that stipulates the degree of misconduct that will justify a summary dismissal and there will inevitably be grey areas. Where disobedience is concerned it has been held that the disobedience must at least have the quality that it is wilful – a deliberate flouting of the essential contractual conditions: **Laws v London Chronicle Ltd** [1959] 2 ALL ER 285. The employee must, by his conduct, have shown that he is disregarding the essential conditions of the contract of employment.

Unauthorised deduction of wages

119. Section 13 Employment Rights Act 1996 provides:

(1) An employer shall not make a deduction from wages of a worker employed by him unless--

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised--

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Submissions on behalf of the Claimant

120. Mr Webster drew the Tribunal's attention to **pages 93, 101, 102, 104, 112** concerning the views and actions of management within the control room. He referred to the 'striking evidence' of the email from Mr Everett at **page 143** and placing great emphasis on the involvement of Mr Everett and others. The email at **page 143** from Mr O'Rourke was, he submitted, procured for the purposes of effecting the Claimant's dismissal. He submitted that the evidence positively showed this and that, in any event, the Tribunal could properly infer this to be the case. Mr Webster also relied heavily on **page 173**, being Mr Tisseman's email, in support of his argument that this also tainted Mr Kelly's decision to dismiss.

121. He submitted that the evidence revealed departmental management provoking an original investigation against the Claimant and thereafter interfering with it. This, he submitted, was a direct consequence of the PID.

122. Mr Webster went on to amplify his submissions by reference to the list of issues (for which see **Appendix**).

123. In relation to the initiation of the second disciplinary offence (breach of the terms of suspension), Mr Webster submitted that this was raised for first time on **28 May 2020**. Among other things, he referred to the email on **page 185** by which time, he submitted, the Respondent was aware that the Claimant had asked for investigation meeting to be rescheduled. This, he submitted, smacks of an employer not interested to hear the Claimant's response but determined to press on regardless. Mr Webster was critical of the purported investigation into the breach of suspension allegation [**page 188-189**] contending that no reasonable employer would have acted as the Respondent did in this case.

124. He submitted that the introduction of the 'breach of suspension' issue was a naked attempt to get rid of the Claimant. However, he clarified that he was not saying that Mr Kelly was not genuine in dismissing C for breaching terms of suspension. Mr Webster said that he was not suggesting that the principal reason Mr Kelly had in his mind was the disclosure. However, by application of the principle in **Jhuti**, and relying on the case of **Uddin**, he argued that the Tribunal could attribute the sinister motivation of Mr Everett and Mr Tisseman to Mr Kelly (should the Tribunal conclude their motivations were the making of the PID).

125. Therefore, whilst Mr Kelly was not personally motivated by the PID, Mr Webster submitted that the whole case against the Claimant (including the breach of suspension allegation) was prosecuted by others because of the PID and were it not for the PID, Mr Webster submitted, the Claimant would not have been dismissed. He relied heavily on Mr Tisseman's email on **page 173**. He submitted that even though the Claimant attended site in apparent breach of the terms of his suspension, it does not follow that he had to face an allegation of gross misconduct. It is not automatic. Someone has to make the decision to make it the subject of a disciplinary allegation and to identify it as something for which he may be dismissed. Mr Webster submitted that the motivation for the laying of that charge was those managers in 'control' (Messrs Tisseman, Shaw and Everett) and what motivated them was the original disclosure. He urged us to attribute this motivation to Mr Kelly, who – upon seeing that the Claimant admitted to attending site on 26th May without permission to do so – dismissed him for gross misconduct

126. Mr Webster relied on a number of factors which he submitted were relevant both to the 'inadmissible' reason for dismissal and in any event to the reasonableness of the decision to dismiss. The key ones were: Mr Kelly accepted that he did not make any efforts to investigate why Mr Everett obtained a statement from Mr O'Rourke even though that was an obvious line of inquiry; that the investigation meeting with M Lynch into the breach of suspension matter was not rescheduled and proceeded without any input from the Claimant; that Mr Kelly did not seek to establish who the Claimant saw, how long he was present when he attended site and crucially whether the Claimant had sought to interfere with the investigation into his alleged conduct; that Mr Kelly did not ask what items the Claimant retrieved; that there was a whole raft of questions not asked by Kelly in what was an extremely brief hearing.

127. Mr Webster submitted that the letter inviting the Claimant to a hearing [**page 185**] was confusing and related only to the first three allegations; the new (fourth) allegation was about 26 and 27th but the Claimant is not asked about 26th at all, which might have shed some light on his attendance on 27th.

128. Mr Webster referred to the case of **Strouthos v London Underground**, submitting that the dismissal letter at **page 202** made clear that the Claimant was also dismissed for different reasons concerning risk assessments and breach of public health advice. However, nothing like that was framed against the Claimant. That was not why he was invited to a disciplinary hearing. He made submissions in respect of paragraph 11 of Mr Kelly's witness statement. Mr Webster submitted that Mr Kelly treated the Claimant and the disciplinary hearing in a cursory manner bearing in mind the Claimant's length of service and that a reasonable employer would have made a more diligent inquiry and would have sought a better understanding of all the basic facts, including the things which formed the basis of the original allegations.

129. As regards the appeal, Mr Webster referred to Mr Hyde's interpretation of matters which was that he believed he was compelled to dismiss the Claimant and not uphold the appeal. This was so, despite Mr Hyde making an express finding that the Claimant had made a trip to obtain essential medicine and despite accepting that the Claimant tried to make contact with Ms Prendergast before he went to site. On any view, he submitted that the decision to terminate the Claimant's employment was outside a range of reasonable responses.

130. Mr Webster submitted that there should be no Polkey reduction as, given the Claimant's explanations for attending site – which were not disputed – and given the substantial failings of the Respondent, it could not be said that the Claimant might have been fairly dismissed. He further submitted that there should be no reduction for contributory conduct in light of the fact that the Claimant had a good explanation for attending the site.

131. As regards the claim in respect of outstanding holiday pay, Mr Webster referred to the contract of employment which said that an employee needs permission to carry over annual leave. This complaint was pursued under as a breach of contract and/or an unlawful deduction of wages complaint. Mr Webster submitted that the essential point was that permission was given by Mr Tisseman to carry over 8 days and there is no evidence from the Respondent to counter this. Mr Haines agreed that if the Claimant's evidence was accepted, the 8 days outstanding holiday should be paid.

132. Finally, in respect of the unlawful deduction of wages complaint, Mr Webster submitted that this was merely a case of arithmetic, that the Claimant ought to have been paid on the basis of actual hours as opposed to average earnings, which was the erroneous approach taken by Ms Todd.

Submissions on behalf of the Respondent

133. Mr Haines started with the reason for dismissal. He submitted that it related to conduct and was a potentially fair reason – the reason being that the Claimant breached the terms of his suspension in that he failed to obtain permission to attend site on two occasions.

134. He submitted that the decision to dismiss was within a range of reasonable responses open to the Tribunal, reminding us that it is not for the Tribunal to substitute its view for that of the employer, referring to **London Ambulance Service NHS Trust v Small**.

135. Turning to the reason for suspension, this was, Mr Haines submitted, due to the concerns raised by Mr O'Rourke, as set out in the email at **page 143**. Those matters could give rise to a suspension and the suspension was not a response to the Claimant's PID from two weeks earlier.

136. The Claimant attended site on 26th and 27th May without authority, during a period when the country was in a 'hard lockdown'.

137. Mr Haines submitted that, whereas the Claimant said he made multiple calls to Ms Prendergast, there was only one call evidenced. The Claimant could have left a message but did not. He pointed to the fact that the Claimant had emailed Ms Prendergast [**pages 176 and 179**], submitting that his failure to do so about the need to attend the site was inexplicable. Mr Haines submitted that it was likely that the Claimant made no attempt to gain permission or at best made one attempt. He could have texted, or email – as he did on **03 July 2020** asking for authority. This, submitted Mr Haines, contributed to his dismissal;

138. Mr Haines referred to the letter of suspension which set out the consequences of not adhering to its terms: that it 'will' be regarded as Gross misconduct which may render him liable to dismissal. There was no ambiguity in the terms of suspension; it was clear.

139. Although the disciplinary hearing took only 10 mins, there was, Mr Haines submitted, no rational explanation from the Claimant for not gaining permission to attend site and he openly admitted that he had attended on two days.

140. As to the process, Mr Haines submitted that a fair process had been followed.

141. As to outcome, Mr Haines referred to **Sandwell v Westwood**, where at paragraph 110-111. He submitted that this was a case of deliberate wrongdoing; that it was reasonable to regard it as gross misconduct especially given the risks associated with the COVID-19 pandemic at the time.

142. Mr Haines accepted that Mr Kelly did not explore any of this in disciplinary hearing;

143. Mr Kelly did not take any of the other allegations into account; it was purely on breach of the suspension; he had not seen the Claimant's email of **05 May 2020** [**page 93**]. He could not have been motivated by the PID and the principal reason for dismissal was not that the Claimant had made a PID.

144. While not accepting that Mr Everett or Mr Tisseman were motivated by the making of the PID, Mr Haines submitted that the Tribunal should not, on the evidence, attribute their motivations to Mr Kelly, as it was the Claimant's own admission of the breach of the terms of suspension that resulted in his dismissal.

145. Mr Haines submitted that a reasonable employer could have arrived at same decision. As for the appeal, Mr Haines accepted that the effect of Mr Hyde's evidence was that nothing the Claimant might have said by way of explanation would have resulted in Mr Hyde allowing the appeal.

146. On the subject of **Polkey**, Mr Haines submitted that if the Tribunal were to find that the dismissal was procedurally unfair, had the Respondent further explored the Claimant's reason, the outcome would have been the same as his reasons for attending do not mitigate his failure to seek permission. When asked whether it would be relevant to consider the purpose of the suspension, Mr Haines said that he could say little about this as there was no evidence as to what the purpose of suspension was. He submitted that the inference could be drawn from the nature of the allegation that it was to protect the Claimant from undermining the investigation into his conduct and potentially protecting him against grievances from staff on site as they tried to get on with their work.

147. Mr Haines accepted that a reasonable employer might have considered the reason or explanation given by the Claimant for attending without permission in the context of and against the purpose of suspension.

148. Mr Haines submitted that the Claimant's attendance was in breach of health and safety albeit he accepted that the Tribunal had not heard any evidence on this. Nonetheless, he submitted that there was a high chance of dismissal in any event if a fair procedure or fair investigation had been undertaken (that is, should the Tribunal conclude that the procedure and investigation was unfair/unreasonable).

149. As to contributory fault, he submitted that the Claimant clearly and directly contributed to his dismissal by conduct. He submitted that a 100% reduction in any award would be appropriate.

150. As to the complaint of detriment (section 48 ERA), Mr Haines submitted that the Claimant had been subjected to no detriment whether by Mr Everett or by any other manager in or out of the control room by being investigated and suspended and certainly not because of his disclosure on **page 93**.

151. If wrong on the question of 'detriment', he accepted that the burden of proof was on the Respondent under section 48 to show the ground on which the Respondent acted. As to that issue, he accepted that it was open to the Tribunal in these proceedings to draw adverse inferences from the failure of Mr Everett, Tisseman, Shaw, Lynch and/or Ms Prendergast to give evidence but urged us not to do so. He submitted that we should not accede to Mr Webster's submission that the email from Mr O'Rourke at **page 143** was procured for the purposes of effecting the Claimant's suspension and ultimate dismissal and he surmised that it was obtained by someone from HR.

152. On the subject of the Claimant's holiday entitlement on termination, Mr Haines submitted that there was 'no paper evidence' of the agreement to carry over. As regards the unlawful deduction of wages complaint, he urged us to accept that Ms Todd's approach to calculate his average pay as opposed to actual hours was the correct approach and that there was no additional amount of money that had been properly payable. He accepted that the issues turned on whichever approach was the correct approach to take.

Discussion and conclusion

Protected Disclosure

153. As indicated at the outset, this is not in dispute. The Respondent accepted that the Claimant made a protected disclosure to Suzanne Prendergast and David Everett on **05 May 2020** in his email on **page 93** of the bundle. That takes care of the issue in paragraph 1a – the relevant disclosure being described in sub-paragraph (iii).

Was the Claimant subjected to any detriment on the ground that he made that disclosure, in contravention of section 47B ERA 1006?

Detriments

154. The alleged detriments were identified in the list of issues paragraph 2(1)-(5), with paragraph 2(2) being broken down further into 6 detriments.

Detriment 2(a)(1) – removal from Saturday shift

155. The first alleged detriment is '*the removal on 18 May of the claimant from the Saturday shift*'

156. Although it is correct to say that the Claimant was told on **18 May 2020** that he was not required to work the coming Saturday shift (on **23 May**), in our judgement, this does not add anything to the detriment of suspension, which we will come to below. That he did not to work the Saturday shift was part of the consequence of suspension. We infer from our findings in paragraphs 19-28 and 35-37 above that the instruction to the Claimant (made via 'Kelli') was simply 'covering' for the fact that the control room managers knew that the Claimant was to be suspended the following day and that was what they were seeking to achieve. We infer from the fact that the Claimant was told on **18 May** that he was not to be working the

forthcoming Saturday shift, that Mr Everett and Mr Tisseman knew in advance that the Claimant was to be suspended. They did not tell 'Kelli' this and the Claimant was told that it was to afford him rest. It would have been necessary to find cover for the Saturday shift in advance and we infer that the explanation the control room managers agreed to convey to the Claimant was that it was to enable him to rest.

Detriment 2(a)(2)(i) – initiation of investigation into the Claimant's conduct

157. It is not in dispute that the Respondent commenced an investigation into the Claimant's conduct or that he was suspended. We are satisfied that any reasonable worker would regard a disciplinary investigation of their conduct and suspension as amounting to a detriment (applying the law as per the case of **Shamoon**). Mr Haines did not argue otherwise – especially, in circumstances where (as we have found) the statement on which the investigation was based was procured by management. Again, Mr Haines did not seek to argue that suspension was not a detriment. In any event, we are satisfied that by suspending the Claimant, the Respondent did indeed subject him to a detriment. He was told he could not attend site; it subjected the Claimant to rumours and gossip on site, as referred to by Ms Harrison and – as it turned out – the suspension resulted in him receiving less in pay than he would have received had he not been suspended (in the sense that he would have worked the next couple of Saturdays and would have been paid for them).

158. The Claimant's case is that he was subjected to the detriment of being investigated and suspended from work on the ground that or because he made the protected disclosure on **05 May 2020**. It is accepted that he did make a protected disclosure. The Tribunal has concluded that the Claimant was subjected to these detriments and the Claimant has established a prima facie case that the initiation of the investigation into his conduct and suspension must be explained It is, therefore, for the Respondent to show the ground on which he was investigated and suspended. This requires it to show that the person who made the decision to suspend – said to be Mr Lynch in discussion with Ms Prendergast – was not materially influenced by the PID. The Respondent says that the Claimant was suspended because of the allegation of bullying and intimidation following the complaint from Mr O'Rourke. As we have commented earlier, we have not heard from Mr Lynch, Ms Prendergast, Mr Everett or Mr Tisseman in these proceedings. None of these was called to give evidence, despite the issues having been identified from the outset in the Claim Form (paragraphs 29, 31, 32, 40, 41 of the Claim Form) and the Claimant's email of **22 May 2020** (see paragraph 42 above). No explanation was proffered for their absence. Mr Haines submitted that, although we had not heard from those individuals, we could and should infer that the reason for the investigation and suspension was the allegation of bullying and intimidation against Mr O'Rourke. Mr O'Rourke had provided a statement and it was this that resulted in the Claimant's suspension.

159. We disagree. The Respondent has not satisfied us on the evidence that it was not materially influenced by the PID. Indeed, on the contrary, we are positively

satisfied from all the evidence we have heard and seen that the Respondent was materially influenced by the Claimant's PID – by the Respondent, we mean the control room managers and Mr Lynch and Ms Prendergast. We infer this from all of our findings set out above leading up to the suspension but in particular the following:

159.1. On **23 April 2020**, David Everett rang the Claimant cautioning him against sending Mr Clark home from work for any coronavirus issue, as the Claimant did not have the authority to do so (see paragraph 12 above)

159.2. Thirty minutes after the Claimant made the PID on **05 May 2020**, Mr Everett emailed Ms Prendergast, copying in John Shaw [**93**]. dismissing the Claimant's email as '*absolute nonsense'* and that the Claimant was '*getting beyond a joke'; that 'these accusations are becoming increasingly common and unfounded and I believe we need to investigate these fully and unless evidence is found to substantiate his claims, we should take action*. (paragraphs 19-20 above)

159.3. The following day, on **06 May 2020** @ **08.29**, Mr Shaw emailed David Everett, Suzanne Prendergast and Stuart Tisseman [**page 102**] that: '*this employee is getting out of control and is putting out accusations left right and centre. It's always someone else who seems to be the problem, and he cannot work with anyone without causing issues*.' (paragraph 21 above)

159.4. Mr Everett and Mr Tisseman took it upon themselves to investigate the Claimant's complaint. (paragraph 23 above)

159.5. The procurement of Mr O'Rourke's statement (paragraph 35 above) – which we infer from our above findings was for the purposes of suspending, disciplining and securing the dismissal of the Claimant.

159.6. The description of Mr O'Rourke's complaint as 'manipulation, bullying and intimidation' when his statement does not refer to this. (paragraphs 35 and 37 above)

159.7. Telling the Claimant that he was not required to work Saturday because he was to be given a rest (paragraph 36 above)

159.8. The absence of any evidence from Messrs Everett, Tisseman, Shaw, Lynch or Ms Prendergast

160. We conclude that those managers in the Control Room (Everett, Shaw and Tisseman) saw the Claimant as a thorn in their side. They were motivated to take disciplinary action against him, starting with procurement of a statement from Mr O'Rourke, then suspension, because he had (among other things) emailed Ms Prendergast on **05 May 2020** complaining of the matters set out in his email. We

are further satisfied that they influenced Mr Lynch and Ms Prendergast in this regard such that we would be able to attribute the motivations of Messrs Everett, Shaw and Tisseman to them in so far as they made the decision to investigate and suspend – they were peculiarly dependent upon the information supplied by those managers in the control room. In any event, the burden being on the Respondent, it has not satisfied us that Mr Lynch was not also personally motivated by the fact that the Claimant made the PID.

161. Coming back to the list of issues, we do not consider paragraph 2(a) ii, iii, iv, v and vi as adding anything to the detriment of initiating an investigation and suspending the Claimant. We have found that some details were given to the Claimant on **19 May 2020** (that is para 2(a)ii) so there is nothing in that complaint, albeit the Claimant was given a very short period of time prior to the telephone meeting on **20 May 2020**. It is right that Mr Lynch did not take account of the recordings provided by the Claimant, nor did he look at any CCTV (although we are not clear what this would have revealed). However, if anything, these matters only go to justify our inference that Mr Lynch and the control room managers referred to (Messrs Everett, Shaw and Tisseman) were motivated - materially influenced - by the PID [**page 93**].

Detriment 2(a)(3) – instigation of further disciplinary action

162. We turn now to the next alleged detriment, identified in the List of Issues: the initiation of further disciplinary action for attending site on **26 May 2020**.

163. This was a more difficult issue for the Tribunal. What made it so was the fact that the Claimant did in fact attend site twice, whilst suspended, without permission despite having been told in very clear terms that he must first obtain permission before doing so. We first considered whether, by tabling the further disciplinary allegation, the Respondent thereby subjected the Claimant to a 'detriment'. We conclude that it did. We are satisfied that the Claimant genuinely regarded this as a detriment and that his view was reasonable. A reasonable worker, in his circumstances, would regard the taking of disciplinary action, particularly in where he had potentially legitimate reasons for attending site, as amounting to a detriment (applying **Shamoon**).The real question was whether the decision to take this further disciplinary action was done on the ground that the Claimant made the PID on **05 May 2020 [page 93]**.

164. We reminded ourselves of the burden of proof in section 48(2) and how we are to apply it. We have no doubt that the Respondent was influenced to take further disciplinary action by the simple fact that the Claimant had attended site without permission. However, it must show that it was not materially influenced by the making of the PID. On **page 173**, Mr Tisseman refers to '*we'* – '*we have been investigating*…' (see paragraph 54 above). It is possible that by '*we'* he means 'the company'. However, given his involvement and the involvement of Mr Everett and Mr Shaw in the earlier investigation surrounding these events, we conclude that he

meant himself and others, namely Messrs Everett, Shaw, Lynch and Ms Prendergast. We are satisfied that the Claimant has established a prima facie case.

165. We repeat we have not heard from any of those managers in circumstances where the Respondent was on notice that the question of detriment was in issue. The Respondent has not called anyone to explain what happened during the first investigation nor as to why the Claimant was subjected to the further disciplinary complaint; how it came about or who decided to present the complaint. It does not follow that the Claimant of necessity had to be made the subject of a disciplinary complaint because he attended site on **26 May 2020**. Prior to drafting the fourth allegation, the Respondent did not know whether the Claimant had attempted to contact anyone within the Respondent or whether he had any legitimate explanation for attending site when he did. It did not know if he had been given permission by someone in management. Mr Lynch, as we have found, carried out no investigation into worthy of the name. The Claimant only read the email regarding the further investigation into this matter after the time scheduled for the 'investigation meeting'. The Respondent – Mr Lynch and Ms Prendergast - did not consider giving him a further opportunity to attend a fact-finding meeting in those circumstances. Mr Lynch did not seek to ascertain, therefore, why the Claimant attended site whilst on suspension and there was no suggestion (and no evidence) that the Claimant had attempted to interfere with any investigation into the disciplinary allegations against him when he attended site.

166. We must apply the law as in the case of **Fecitt** and as set out in section 48(2) ERA. The Respondent has failed to satisfy us that, in pursuing this further disciplinary allegation against the Claimant, it was not materially influenced by the fact of the PID. Indeed, we infer from our findings that management in the control room and Mr Lynch (having already been motivated by the Claimant's PID) seized on the Claimant's apparent breach of the suspension and added it to the list of offences to be considered by Mr Kelly at the disciplinary hearing and that, in doing so, they were as much motivated by the PID, as they were when they first investigated him and suspended him in connection with the allegations of bullying and intimidation. We remind ourselves that it is not essential that the PID be the sole motivating factor in order to amount to a contravention of section 47B. It may well be that Mr Lynch and the control room managers were influenced to lay the fourth charge against the Claimant by the simple fact that he had attended site without permission but they were also, we infer, materially influenced by the PID.

167. We now turn to some of the other alleged detriments, none of which, in our judgement takes matters any further:

Detriment: paragraph 2(a)(4): at the disciplinary hearing on 03 June 2020 failing to afford the Claimant the opportunity to engage

Detriment: paragraph 2(a)(5): failing to take into account the actions of Mr O'Rourke or the recordings

168. We can take these together. Although we have found that Mr Kelly did not engage with the Claimant's explanation, he did afford the Claimant an opportunity to engage and to speak – that is so, even though the hearing did not last very long. Even if he did not afford the Claimant a sufficient opportunity to engage, we do not find that this was a deliberate failure that was materially influenced by the PID on **05 May 2020**. We are not sure what is meant by '*failing to take account of the actions of Mr O'Rourke*'. In any event, these complaints are integrally wrapped up in the dismissal of the Claimant such that, in our judgement, they cannot be pursued as separate detriments short of dismissal, As for the recordings, Mr Kelly did listen to some of them albeit he did not discuss them at the disciplinary hearing.

169. In light of our findings and conclusions we find that the complaint of detriment under section 48 succeeds in respect of issues: **2(a)(2)(i) and (3).**

170. We turn now to the dismissal. We first consider the reason for dismissal.

Unfair Dismissal – reason for dismissal

171. As articulated above, it is for the Respondent to establish the principal reason for dismissal. In considering section 103A, the legal approach is different to that under section 48 ERA. If the Respondent satisfies the Tribunal that the principal reason for dismissal was breach of the terms of suspension and that it was not the making of the PID on 05 May 2020, then the complaint of automatically unfair dismissal must fail – even if the making of the PID constituted a peripheral reason for terminating the Claimant's contract of employment.

172. Mr Webster conceded that Mr Kelly, who dismissed the Claimant, was not personally motivated by the Claimant's PID. Nor does he suggest that Mr Hyde was motivated in his appeal decision by the PID. However, Mr Webster says that it does not matter that Mr Kelly was not personally motivated. He says that the Respondent cannot show that the principal reason for dismissal was the Claimant's conduct in attending site and that, in fact, the principal reason was the PID. As set out in the submissions section above, he relied on the Supreme Court decision in **Royal Mail v Jhuti**.

173. On the face of things, this case appears to be different to the 'classic' 'Jhuti' case. Mr Everett, Mr Tisseman and Mr Shaw were intent on advancing allegations of misconduct (bullying and intimidation of Mr O'Rourke) against the Claimant because he had made the disclosure on **05 May 2020**. Mr Kelly, on the other hand, did not dismiss for that reason (and this is not challenged by Mr Webster). He dismissed for the breach of suspension. In **Jhuti**, the (innocent) dismissing manager dismissed Ms Jhuti for poor performance – that poor performance was the thing that was manipulated or invented by the 'Iago' manager. Therefore, the fabricated or manipulated reason was adopted by the 'innocent' decision-maker. In Mr Arthur's case, the manipulation extended to the allegation of bullying and intimidation. Mr Kelly, however, did not dismiss the Claimant because he believed him to have bullied or intimidated Mr O'Rourke – this did not feature in his thinking.

He dismissed him because he turned up at site during his suspension without permission from HR or a senior manager in contravention of the terms of the suspension letter.

174. We have considered carefully Mr Webster's submission that there was sufficient involvement from the other managers (whose motivation was the disclosure) in the bringing of the 'breach of suspension' allegation to permit their motivation to be attributed to Mr Kelly, the decision maker. It was, he submitted, a classic 'Jhuti' situation.

175. Mr Webster placed great reliance on the email at **page 173** as connecting or 'tainting' the innocent Mr Kelly's decision with the inadmissible motivation of the control room managers and in particular, Mr Tisseman. We agree that in laying the 'charge' against the Claimant, those managers we have identified were motivated by the PID.

176. We found this a particularly difficult aspect to resolve. In the end we resolved it in favour of the Respondent. We had invited the parties to make further submissions in relation to the case of **Kong v Gulf International**. The Tribunal in that case found that the motivation of those who brought complaints to the ultimate decision maker was to effect the dismissal of the claimant for raising PIDS.

177. That was similar to Mr Arthur's case – in relation to all charges against him (including the fourth one) the motivation of those who brought the complaints was the PID and the desire was that the ultimate decision maker would dismiss him. In Mr Arthur's case, we were satisfied that he had established a prima-facie that his dismissal was because he had made a PID. At the very least this prima facie case is established on a 'but for' basis: but for the fact he raised the PID he would not have been suspended and but for the suspension he would not have been dismissed on the basis that he had breached its terms, but there is also the email at **page 173** showing Mr Tisseman's involvement.

178. As set out above, it is for the Respondent to show the 'principal reason' for dismissal. That means that the Respondent must show the factors that operated on the mind of the decision maker – in this case, Mr Kelly. Those factors will be the decisive factors unless the motivation of others can be attributed to him.

179. We have found that Mr Tissemann and Mr Everett were involved to some degree in the investigation into the breach of suspension. Both of those individuals sit above the Claimant in the managerial hierarchy. Therefore, the first of the two common features identified by Lord Wilson in **Jhuti** is satisfied: namely, the person whose motivation is to be attributed (in this instance, Mr Tisseman) sought to procure the Claimant's dismissal for the proscribed reason. However, it is the second feature which we conclude, on balance, is not present. Mr Kelly, as the decision maker was not peculiarly dependent on Mr Tisseman or Mr Everett for the underlying facts that led to his decision to dismiss the Claimant.

180. Mr Kelly, for his part, did not look at or consider any of the underlying issues or complaints relating to the alleged conduct of the Claimant. He had not seen the email at **page 173** (on which Mr Webster heavily relies). As far as Mr Kelly was concerned, whatever the truth of the allegations against the Claimant, the simple fact was that he had attended work while on suspension in breach of a clear instruction not to do so, without obtaining prior permission. Mr Kelly relied solely on the Claimant's admission – as Mr Kelly regarded it – that he attended site in breach of his terms of suspension.

181. In our judgement, the Claimant's conduct in making the PID and in attending site while on suspension without permission are, therefore, separable for the purposes of analysing firstly the reason for the suspension and laying of the 'breach of suspension' charge; and secondly the reason for dismissal. In Jhuti, the dismissing officer adopted the performance issues which had been manufactured by another manager (and which were motivated by a PID). Thus, the manufactured reason was attributed to the dismissing manager. In this case, Mr Kelly did not adopt the 'manufactured' complaint of bullying and intimidation. Instead, he dismissed for another reason, namely breach of the terms of suspension, and the information he relied on did not emanate from Mr Tisseman or Mr Everett.

182. We do not accept Mr Webster's very able submission that this case is within the 'Jhuti' zone – as the managers with the proscribed motivation (Tisseman and Shaw – see **page 173**) were motivated in the bringing of the complaint of breach of suspension. Whatever Mr Tisseman's motivation (and that of others), he or they did not invent the fact that the Claimant had attended site without permission in apparent breach of the terms of his suspension. We note that in **Cadent Gas Ltd v Singh** the EAT accepted that for the approach expounded by the CA in **Jhuti** to be applicable 'some manipulation must be evident' (see para 66 of **Kong**). While there was earlier manipulation in the framing of the original allegations, there was no manipulation of the facts Mr Kelly relied on or believed and which led him to dismiss the Claimant.

183. In the circumstances, although we have conducted the wider inquiry as submitted by Mr Webster, we do not impute the motivation of other managers in the Control Room to Mr Kelly and we have applied the general rule that the reason for dismissal was the factor operating only on the mind of Mr Kelly, namely his genuine belief that the claimant had breached the terms of suspension. The Respondent has satisfied us that the principal reason for dismissal was the breach of suspension and that this reason related to conduct.

Unfair dismissal: section 98(4)

184. Having found that the Respondent has shown the principal reason for dismissal and that this related to conduct, we turn now to the question of fairness and 'general unfair dismissal'. We have applied the principles in paragraphs 100-110 above. As stated, there is no burden on the Respondent to show that the decision to dismiss

was reasonable. The question at this stage, is simply whether the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant.

185. We are satisfied that the Respondent acted unreasonably and that the decision to dismiss the Claimant was unfair for the following reasons:

185.1. There was no investigation, or at least, no reasonable investigation into the fourth allegation against the Claimant (the breach of suspension complaint). A reasonable employer would not have proceeded to a disciplinary hearing without having investigated the matter first. No reasonable employer, knowing that the Claimant had not seen the email inviting him to the investigatory meeting on **29 May 2020** until after the event (see paragraphs 57 to 59 above) would have proceeded as the Respondent did. A reasonable employer would have re-arranged the investigatory meeting and would have sought to understand why the Claimant had attended site. Prior to inviting the Claimant to the disciplinary hearing, the Respondent did not know whether the Claimant had attempted to contact anyone within the Respondent or whether he had any legitimate explanation for attending site when he did. A proper investigation would have discussed and recorded the Claimant's explanations for his attendance. It would have discussed and recorded his attempt or attempts to contact HR. It would have discussed and recorded what the Claimant did when he attended site, who he spoke to and what about.

185.2. The letter inviting the Claimant to a disciplinary hearing on **03 June** did not state that the Claimant was to face the allegation of attending site without permission at that hearing. The Claimant did not understand that he was to face that allegation of gross misconduct at that hearing. This was grossly unfair to the Claimant.

185.3. At the disciplinary hearing itself, Mr Kelly did not engage with the content of the fourth allegation. He did not seek to establish whether the Claimant had spoken to any of the individuals named in the allegation or what, if anything, he had spoken to them about. The allegation against the Claimant was that he attended site to speak with Robert O'Rourke and the clients Peter Short, Steve Claxton and Emma Harrison and collected some of his belongings. It was this in respect of this allegation that Mr Kelly dismissed him, yet Mr Kelly made no findings as to who the Claimant spoke to and about what.

185.4. When he arrived at his decision to dismiss Mr Kelly did not hold as a belief that the Claimant had spoken to the individuals identified in the allegation. He did not even get into that.

185.5. Mr Kelly did not engage with the Claimant's explanation for attending site. We conclude that Mr Kelly simply proceeded on the basis that, as the Claimant was told that he needed permission to attend site and as he admitted

he did not have permission, this in itself amounted to gross misconduct. Any explanation for attending in these circumstances was irrelevant to Mr Kelly and he did not give the Claimant's explanations any consideration. In oral evidence Mr Kelly explained that '…*the fact that he provided evidence that he did something that was tantamount to gross misconduct, we did not get into the other things. Had he not admitted what he did we would have discussed everything and potentially more, whatever he wanted to bring to the table*'.

185.6. We conclude that a reasonable employer would wish to fully understand why the Claimant attended site, who it was the Claimant spoke to whether he had, in any way and tried to impede the investigation into his own conduct.

185.7. Mr Kelly took into account the Respondent's COVID 19 risk assessment even though this had not been raised with the Claimant in advance, or at the disciplinary hearing. It was a significant issue in Mr Kelly's thinking. The Claimant had been given no opportunity to comment on this and there was no analysis by Mr Kelly or anyone else as to what risk the Claimant had, in fact, presented when he attended site. Mr Kelly was significantly influenced by the direction of the government at the time that people should work from home and not travel unnecessarily. As in the **Strouthos** case referred to by Mr Webster (paragraph 110 above) there is an inherent unfairness in relying as a factor I the decision to dismiss on a matter that was never raised with the Claimant. No reasonable employer would have factored this into the decision making without first raising it with the employee and giving the employee an opportunity to respond and then analysing what actually happened when the Claimant attended site.

Sanction of dismissal

185.8. There is no reference to 'gross misconduct' in the Employment Rights Act 1996. An employee may be fairly dismissed for a reason 'related to conduct' even where that conduct is not and cannot be described as 'gross misconduct'. When considering reasonableness, the Tribunal is not to get embroiled in determining whether the employee's conduct constituted gross misconduct or not. We have set this out in the 'relevant law section' above. It is the reasonableness of the employer's decision that is under scrutiny under section 98(4). We have concluded that the Claimant's conduct in attending site without obtaining permission did not amount to a repudiatory breach of contract when considering the complaint of wrongful dismissal (see below).

185.9. Nevertheless, when it comes to considering the reasonableness of the sanction of dismissal under section 98(4), the Tribunal is entitled to consider whether the employer acted reasonably in characterising the employee's conduct as gross misconduct, especially in a case such as this, where it was the characterisation of the Claimant's admission (that he attended site without permission) as gross misconduct which resulted in the decision to dismiss and

the rejection of the appeal. As observed by HHJ Hand QC in **Eastland Homes Partnership Ltd v Cunningham** (see above), although the well known authorities do not suggest that any finding as to the reasonableness of the characterisation of conduct as gross misconduct is called for, section 98(4) requires consideration of 'all the circumstances'. If the employer's view that the misconduct is serious enough to be characterised as gross misconduct is objectively justifiable then that should be considered as one of the circumstances against which to judge the reasonableness or unreasonableness of treating the conduct as a sufficient reason for dismissal.

185.10. Mr Hyde accepted in evidence to the Tribunal that the Claimant had legitimate reasons or potentially legitimate reasons for attending site. Neither Mr Hyde nor Mr Kelly challenged this or that the Claimant had attempted to contact Ms Prendergast before he attended on **26th May 2020**. There was no evidence before Mr Kelly or Mr Hyde that the Claimant had attempted to interfere with the investigation into his conduct (for which he had been suspended) and no evidence that he had even spoken to Mr O'Rourke. Neither manager addressed this at any point during their involvement. All that the dismissing and appeals managers found and believed was that the Claimant attended site and that he did not have permission to do so – without giving any consideration as to the surrounding circumstances or why the Claimant acted as he did.

185.11. No reasonable employer could or would have characterised the Claimant's conduct as gross misconduct (as the Respondent did) without factoring in and considering the Claimant's explanation for attending site and without determining what he did when he attended site. Our conclusion might have been otherwise had the Respondent factored in the Claimant's explanation, considered it but then rejected the explanation for attending as being untruthful or not legitimate – but that was not this case. Nor was it the case that Mr Kelly or Mr Hyde believed the Claimant had tried to interfere with the investigation into his conduct (i.e. the bullying allegation against Mr O'Rourke).

185.12. Further, although in cross examination Mr Kelly said that an 'array of outcomes was available to him', we have found that Mr Kelly in fact believed that he had 'no option' or 'no choice' available to him other than dismissal. That is how he himself put it at [**page 202**]. Without stopping to contemplate, he applied the severest of sanctions to an employee of long service. We considered, but rejected, the possibility that the reference to having 'no option' but to dismiss was no more than a turn of phrase and that it was not what he actually meant. As with Mr Hyde, on the appeal, in our judgement, Mr Kelly believed that the simple fact of attendance on site without permission amounted to gross misconduct and that gross misconduct meant summary dismissal – that is, dismissal followed automatically from the description of 'gross misconduct'.

185.13. We do not accept that Mr Kelly or Mr Hyde had any regard to the Claimant's length of service before deciding whether to terminate the Claimant's employment. The dismissal hearing lasted 10 minutes. Mr Kelly took no time to reflect on the situation and proceeded, without any considered deliberation, to summarily dismiss the Claimant. No reasonable employer, given the Claimant's length of service, would have done so.

185.14. A reasonable employer would not have considered the attendance of the Claimant at the site in isolation. A reasonable employer would have wanted to get a whole picture which would have involved looking at all the allegations and hearing from the claimant on those matters. A reasonable employer would have investigated properly the other allegations against the Claimant and made findings on those allegations one way or another. Those findings would then have been relevant considerations that a reasonable employer would wish to consider when determining what sanction to apply in circumstances where the Claimant attended site without permission for potentially legitimate reasons and in circumstances where he had not sought to interfere with the investigation into the allegations against him. A reasonable employer would have engaged in a discussion with the Claimant as to why he felt he needed to attend site in order to find someone to accompany him to the disciplinary hearing, recognising that no direction had been given to the Claimant in the letter inviting him to a disciplinary hearing as to how he was to organise this at home over the telephone.

186. Stepping back and looking at the three elements of the **Burchell** test, we were satisfied that Mr Kelly (and Mr Hyde) genuinely believed that the Claimant had breached the terms of his suspension letter by attending site during suspension without permission during the first COVID national lockdown and that this was the reason for dismissal. There was, however, no investigation into the fourth allegation (which contained the allegation that he attended to speak to Mr O'Rouke and others). We must conclude that Mr Kelly had reasonable grounds for their conclusions simply because the Claimant admitted that he had done so without permission. Thus, the Respondent meets two of the three elements of **Burchell**. However, the three elements of the Burchell test do not exhaust the range of relevant questions. The fourth allegation was wider than simply 'attending site while on suspension without permission'. It was framed as attending site '*to speak to….* [the named individuals].' It was in this context that the Claimant provided his explanation to Mr Kelly and Mr Hyde for attending site but, as we have found, neither Mr Kelly nor Mr Hyde made any finding as to who the Claimant spoke to and Mr Lynch did not investigate this. The decision to dismiss was based on the very narrow point of simply attending site without permission while on suspension, during the first COVID lockdown (as opposed to attending site for the purpose of speaking to Mr O'Rourke and others). We must consider whether the Respondent acted reasonably in treating the reason for dismissal as we have found it to be as a reason for terminating the Claimant's employment.

187. The question remains then, whether dismissal as a sanction was reasonable in all the circumstances. Again, we reminded ourselves that we must not substitute our view of the appropriate penalty for that of the Respondent. What is reasonable depends on all the circumstances of the case (see paragraph 3 ACAS Code). As we have found, this Respondent did not consider all the circumstances of the case. Nor did it take account of the Claimant's length of service as a reasonable employer would. Finally, in contemplating sanction, in our judgement, a reasonable employer would have considered the original allegation against the Claimant and would seek to understand how that complaint of bullying and intimidation came to be made in the first place; what, if any, substance, there was to it and how, if at all, it impacted on the fourth allegation of breach of the terms of suspension or any sanction that might be imposed in respect of that. This Respondent did none of this. We conclude that the sanction of dismissal was, therefore, outside the range of reasonable responses open to a reasonable employer and that the decision to dismiss the Claimant was unfair.

Polkey

188. We were invited by the Respondent to make what is known as a 'Polkey' reduction. In particular, Mr Haines invited the Tribunal to reduce any compensatory award to reflect the chance that the Claimant may have been fairly dismissed at the time of his dismissal or shortly thereafter had the Respondent followed a fair process. We do not make any 'Polkey' reduction, however. The Respondent must adduce some evidence or at least be able to rely on some evidence which has come out in the proceedings in support of an argument that the Claimant might have been dismissed had the employer acted <u>fairly</u>. We accept that this is a speculative exercise and that the Tribunal, in the right circumstances, must engage with the exercise. However, it must be evidence based. We have found that there was no report from Mr Lynch into the original allegation of bullying against the Claimant (Mr Lynch simply collated statements and passed them on). We have found that Mr Lynch did not investigate the fourth allegation. There being no evidence from Mr Lynch or Ms Prendergast, Mr Kelly was not able to help on any aspect of the investigation. We have found that a reasonable employer would have sought to get an understanding of all of the circumstances and would have looked at the matters which made up the original complaint against the Claimant (at the very least how the complaint from Mr O'Rourke came to be made) as well as considering the Claimant's explanation for attending site during suspension before forming a view on sanction. The Respondent did not none of this and Mr Haines was unable to say what might have come out of it, had the Respondent done so. The failings of the Respondent in this case have been of such significance and it has not demonstrated by reference to any evidence what it would have done had it acted fairly and the onus is on it to do so. Mr Haines simply invited us to make a reduction. He did not identify the evidence on which he relied to warrant any reduction. We cannot decide these things out of thin air. Further, the evidence has demonstrated, in our judgement, that Mr Kelly and Mr Hyde had closed minds as to the outcome – particularly Mr Hyde. Mr Haines accepted that Mr Hyde's

evidence to the tribunal was to the effect that nothing the Claimant could have said by way of explanation would have overturned the decision on appeal. Mr Haines has not been able to point to any reliable evidence to enable the Tribunal to assess what might have happened had this employer acted fairly in the Claimant's case. In those circumstances we do not consider it appropriate to make any 'Polkey' reduction.

Contributory conduct

189. We do conclude that the Claimant did contribute to his own dismissal by his conduct in attending without permission and in not emailing Ms Prendergast expressly about attending. We conclude that he was foolish in attending site when he did without first obtaining permission. However, we limit the percentage reduction to 20% of both basic and compensatory award on the basis that it was no more than foolish and unwise conduct on his part (within the sense of **BBC v Nelson**). It did contribute to his dismissal but the Respondent – through Mr Hyde - accepted the Claimant's reason for attending was legitimate and there was no suggestion that in attending he was trying to interfere with the investigation into the original allegations. Further, the assessment of compensation under section 123 ERA is on a just and equitable basis. Having regard to our finding that the Claimant acted foolishly and having regard to the extensive failings on the part of the Respondent, it would not be just and equitable to reduce the award by any more than 20%. We have considered but decided not to distinguish between the basic and compensatory awards. The 20% deduction shall apply to both awards.

190. Therefore, the Claimant succeeds on the detriment complaint and the general unfair dismissal claim.

191. We turn now to the other complaints in relation to wrongful dismissal, holiday pay and unlawful deduction of wages.

Wrongful dismissal

192. We conclude that the Claimant was not in fundamental breach of contract in attending site without permission on 26th and 27th May 2020. It was accepted that he had legitimate reasons for attending site – albeit he had not obtained permission to attend. We have found that the Clamant attended site to arrange for someone to accompany him at his forthcoming disciplinary hearing and, as a secondary reason, to collect his medication. Considered objectively, that conduct – whilst in breach of the terms of his suspension in that he did not have permission to do this - does not evince an intention not to be bound by the essential terms of his contract of employment. It was not wilful disobedience. It did not strike at the heart of the relationship. It was not such that it could be said to so undermine trust and confidence that the Respondent should no longer be required to retain the Claimant in its employment. It was, in our judgement, a misguided and foolish thing not to obtain permission to attend site for what were (and accepted to be) legitimate reasons. Accordingly, the Claimant was entitled to his contractual notice and by failing to give notice, he was wrongfully dismissed.

Holiday pay claim

193. We turn now to consider the complaint of failure to pay for accrued but untaken holidays.

194. We refer to our findings in paragraphs 75 – 78 above. In light of our findings and Mr Haines' concession that this matter turns only on whether the Claimant's evidence is accepted, we conclude that the Claimant's complaint of breach of contract/unlawful deductions/regulation 30 is well-founded. The Claimant was owed a payment in respect of 6.58 days' holiday, amounting to **£688.88**.

Wages claim

195. The final complaint related to the payment of wages during the Claimant's period of suspension. We refer to our findings in paragraphs 37 and 79-81 above. The Claimant was told by Mr Lynch that he would be paid for any shifts during the period of suspension. The Claimant would, in that period, have worked 2 x 12-hour Saturday shifts. Therefore, the wages for those shifts were properly payable to the Claimant and were not paid. The calculation is: 12 x £8.72 = £104.64 x 13 = £1,360.32

196. The Claimant was paid £1,013 (**page 46**), leaving a shortfall of £**347.32** which was properly payable and which, we find, is now payable to the Claimant**.** Therefore, we uphold the complaint of unlawful deduction of wages.

REMEDY

197. There will be a remedy hearing to deal with the following:

197.1. Whether the Tribunal should make an award for injury to feelings on the section 48 detriment complaint and if so, what that award should be;

197.2. What award is due to the Claimant in respect of the complaint of unfair dismissal, holiday pay, wages claim and notice

197.3. Whether, and if so, to what extent, any award should be uplifted in accordance with section 207A Trade Union and Labour Relations (Consolidation) Act 1992 ('ACAS uplift')

Employment Judge Sweeney

22 October 2021

APPENDIX

LIST OF ISSUES

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1. **Protected Disclosure**

    a. Did C disclose information in an email of 5 May 2020 to Suzanne Prendergast **[93]** which in his reasonable belief was made in the public interest and tended to show:

        i. that a criminal offence had been committed (s.43B(1)(a) ERA 1996);
        ii. that a person had failed to comply with a legal obligation to which he was subject (s.43B(1)(b)); and/or
        iii. that the health and safety of any individual had been endangered (s.43B(1)(c))?

2. **Detriment**

    a. Did R subject C to any of the detriments identified at paragraph 37.1 of the case management summary of 6 January 2021?

        (1) On 18 May 2020 Removal of C from Saturday night shift;
        (2) On 19 May 2020 initiating an investigation into C's conduct
            i. Suspending C (Mr Lynch)
            ii. Refusing to give details of allegation on 19 May;
            iii. Giving C insufficient time to prepare for meeting on 20 May 2020;
            iv. Failure to take into account recordings provided by C
            v. Pre-determining the outcome of the investigation;
            vi. Failing to obtain CCTV footage to show the interaction
        (3) Initiating further disciplinary action against C for attending site when suspended;
        (4) At the disciplinary hearing on 03 June 2020 failing to afford C the opportunity to engage fully;
        (5) Failing to take into account the actions of Mr O'Rourke or the recording;

    b. If so, has R shown that they were not materially influenced by the aforesaid disclosure (s.47B and s.48(2))?
    c. If not, what compensation is C entitled to?

3. **Unfair Dismissal**

    Automatically Unfair Dismissal

a. Was the reason (or principal reason) for C's dismissal that he made the aforesaid disclosure (s.103A)?

Ordinary Unfair Dismissal

b. Has R shown that the reason for C's dismissal related to his conduct (s.98(2))? **Respondent maintained that its reason for dismissal was at page 202 = breach of suspension**
c. If so, did R genuinely believe that C was guilty of the alleged misconduct?
d. Did R have in mind reasonable grounds upon which to sustain that belief?
e. At the stage that R formed that belief on those grounds, had R carried out as much investigation into the matter as was reasonable in all the circumstances?
f. Was the dismissal fair or unfair in the circumstances (including R's size and administrative resources) and did R act reasonably or unreasonably in treating it as a sufficient reason for dismissing C in accordance with equity and the substantial merits of the case?

Remedy

g. If C was unfairly dismissed:

    i. Should the basic and/or compensatory awards be reduced by reason of any conduct of the C (s.122(2) / s.123(6) ERA 1996)?
    ii. What compensatory award is it just and equitable for C to be awarded in all the circumstances (including having regard to Polkey principles)?
    iii. Has C mitigated his losses?

4. Wrongful dismissal

a. Did C commit an act of gross misconduct (amounting to a fundamental breach of contract) that entitled R to lawfully terminate C's contract without paying notice?
b. If not, what notice pay is C entitled to be paid?

5. Holiday Pay- Breach of Contract

a. Did R (Stuart Tisseman) agree that C could carry forward 8 days' leave from the 2018/2019 leave year to the 2019/2020 leave year pursuant to clause 13.3 of C's contract of employment [65]?
b. If so, did R's failure to pay C for the said days (which he was unable to take in the 2019/2020 year due to his dismissal) constitute a breach of contract? [**counsel for the Claimant confirmed that this was in fact a claim in respect of unpaid accrued holiday on termination**]
c. If so, what sums are payable to C?

6. Unlawful Deductions

a. Has C suffered an authorised deduction from wages in respect of the period of suspension (20 May 2020 to 2 June 2020) (s.13(1))? [**counsel for the Claimant maintained that this was a 'calculation issue in that the Respondent calculated pay as a salaried as opposed to an hourly paid employee**]